THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2020

An Annual Report on EEOC Charges, Litigation, Regulatory Developments and Noteworthy Case Developments

| MARCH 2021 |

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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Table of Contents

Table of Contents

Table of Contents

Table of Contents

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2020

An Annual Report on EEOC Charges, Litigation, Regulatory Developments and Noteworthy Case Developments

INTRODUCTION

This Annual Report on EEOC Developments—Fiscal Year 2020 (hereafter "Report"), our tenth annual publication, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

This year's Report is organized into the following sections:

Part One examines the impact the COVID-19 pandemic has had on equal employment opportunity law, and provides general EEO guidance dealing with "return to work" issues. In addition, based on the current focus on the COVID-19 vaccine, a significant portion of this section focuses on EEO and related guidance involving the vaccine, including guidance provided by the EEOC. Because the issue of employee vaccinations is multi-dimensional, this section discusses both EEO issues and other legal considerations. The section also addresses the ongoing debate whether, at this juncture, employers should consider mandatory vaccinations or other options as a recommended practice. Appendix A to this Report includes examples of litigation involving employer vaccination policies and practices; although there is not yet EEO litigation involving COVID-19 vaccinations, a review of lawsuits involving the influenza vaccine may serve as a useful starting point for dealing with accommodation issues.

Part Two outlines EEOC charge activity, litigation and settlements in FY 2020, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix B to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix C.

Part Three focuses on the changing composition of the EEOC, its regulatory activities, and other agency priorities and initiatives. This chapter includes a discussion of current and planned formal rulemaking, potential changes to the Commission during the Biden administration, and the EEOC's renewed interest in religious discrimination.

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations. Recent case developments involving two important issues also are addressed in this section of the Report: (1) recent court decisions involving the strict time limitations in challenging EEOC subpoenas applicable to Title VII and ADA investigations; and (2) recent court decisions involving documents completed at the EEOC prior to perfecting a charge, which courts have been relying on in broadly interpreting the time limitations for filing a charge. Appendix D to this Report supplements this section in summarizing subpoena enforcement actions filed by the EEOC during FY 2020.

Part Five of the Report focuses on FY 2020 litigation in which the EEOC was a party. This discussion is broken down into numerous topic areas, including: (1) pleading deficiencies raised by employers and the EEOC; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) intervention and consolidation of claims with private counsel representing charging parties; (4) class issues in EEOC litigation; (5) other critical issues in EEOC litigation, including protective orders, ESI and experts; (6) general discovery issues in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix E; (8) default judgments against employers; (9) impact of bankruptcy proceedings; (10) trial-related issues and those tied to remedies and settlements; and (11) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-E are useful resources that should be read in tandem with the Report. **Appendix A** discusses cases in which parties sued employers for their mandatory vaccination policy. **Appendix B** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury verdicts. **Appendix C** highlights appellate cases where the EEOC has filed an amicus or appellant brief, and decided appellate cases in FY 2020. **Appendix D** includes information on select subpoena enforcement actions filed by the EEOC in FY 2020. **Appendix E** highlights notable summary judgment decisions by claim type.

We hope that this Report serves as a useful resource for employers in their EEO compliance activities and provides helpful guidance when faced with litigation involving the EEOC.

I. EEO ISSUES IN A COVID-19 WORLD: ONGOING EMPLOYER CHALLENGES AND PLANNING FOR WHAT'S ON THE HORIZON – COVID-19 VACCINATIONS

Over the past year, based on COVID-19, employers around the country confronted some of the most challenging issues the employer community has ever faced, which included temporary closures, having employees work remotely, and/or developing infection control strategies to limit the spread of the coronavirus.

As significantly, based on what the Equal Employment Opportunity Commission ("EEOC" or "Commission") viewed as a "direct threat" to employee safety and health, the EEOC established new rules to help employers slow the spread of this devastating virus. The Commission continued to educate the public based on information received from public health authorities and communicated its guidance through EEOC publications, including *What you Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,*[1] which went through numerous iterations as more was learned about the virus.[2]

While the interpretation of various discrimination laws, such as the Americans with Discrimination Act (ADA), was modified based on the unique issues COVID-19 created, the EEOC has referred to its guidance as a "temporary" measure to deal with the pandemic, and the length of time for continued application of the revised rules on the ADA and related EEO laws remains uncertain. New challenges also are evolving in dealing with the virus, including managing reasonable accommodation requests to be excused from vaccination requirements, dealing with requests from those wanting to continue to work from home, and confronting various compliance challenges as other employment laws come into play, particularly for employers that consider mandating employee vaccinations.

This opening chapter addresses both the ongoing rules governing ADA compliance and other EEO laws, and the evolving issues that are arising, including the EEOC's effort to provide guidance in dealing with the vaccine for COVID-19, whether employers recommend or mandate the vaccine for their employees.

A. General Compliance Issues

1. Setting the Stage

The EEOC was relatively well prepared to begin addressing COVID-19 issues at the outset of the pandemic in March 2020. The EEOC had previously issued guidance on *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* in October 2009 after President Obama declared a National Emergency in response to the H1N1 influenza pandemic.[3] While less drastic measures were required in 2009, the EEOC explained that the guidance may be modified depending on the severity and pervasiveness of a pandemic, and that circumstances could arise where the risks become so severe that employers' interests in protecting themselves and their businesses from the spread of disease could outweigh employees' rights under the ADA and other discrimination laws.[4]

On March 11, 2020, the coronavirus disease (COVID-19) was declared a pandemic. A "pandemic" is defined as an "epidemic occurring worldwide or over a very wide area, crossing international boundaries and usually affecting a large number of people."[5] One week later, on March 19, 2020, the EEOC re-issued the guidance based on the World Health Organization's (WHO) pandemic finding.[6] The EEOC has declared that the WHO, U.S. Department of Health and Human Services (HHS), and the Centers for Disease Control and Prevention (CDC) are the "definitive sources" of information about pandemics.[7]

The EEOC underscored that the 2020 guidance focused on "implementing strategies in a manner that is consistent with the ADA and with current CDC and state/local guidance for keeping workplaces safe during the COVID-19 pandemic," and acknowledged that the guidance could change "as the COVID-19 situation evolves."

As discussed below, based on the "pandemic" finding, the EEOC has clearly permitted employers far more leeway than ever before in developing infection control strategies without violating federal discrimination laws.

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1 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, last updated Dec. 16, 2020 (herein "EEOC Q&As").

2 The EEOC initially published the EEOC Q&As on March 17, 2020, and subsequently supplemented them on April 9, April 27, April 23, May 5, May 7, Sept. 8, 2020, and most recently, on Dec. 16, 2020.

3 *See* Terri M. Solomon and Ronit M. Gurtman, *Planning for a Pandemic: The EEOC Issues Guidance*, Littler Insight (Oct. 27, 2009).

4 *Id.*

5 See *A Dictionary of Epidemiology*, 4th edition. New York: Oxford University Press; 2001.

6 *See* EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, last updated Mar. 21, 2020 and fn. 1 (herein *"Pandemic Preparedness Guidance"*).

7 *Id.*

2. The EEOC's 2020 Rules to Slow the Spread of the Virus

Based on EEOC guidance, as updated in 2020, the EEOC's primary focus was on the ADA, and the EEOC applied different compliance standards on a "temporary" basis due to the pandemic. The EEOC's approach was different with other EEO laws, where the EEOC cautioned against potential infection control strategies and conduct that might run afoul of the Age Discrimination in Employment Act (ADEA), Pregnancy Discrimination Act (PDA) and other discrimination laws. The EEOC also reminded employers of practical tools available to address potential workplace harassment stemming from COVID-19.

a. General ADA Compliance

The EEOC's 2020 guidance advised employers that it was "unclear whether COVID-19 is or could be a disability under the ADA."[8] Regardless, in relying on the findings of the CDC and others public health authorities, the EEOC determined that "an employer may bar an employee with the disease from entering the workplace" because the COVID-19 pandemic meets the "direct threat" standard under the ADA, that is, "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[9] This determination gave employers significant flexibility in developing infection control strategies that might not otherwise be permissible under the ADA in the absence of a pandemic.

Aside from the *Pandemic Preparedness Guidance* issued in March 2020, the EEOC provided additional guidance during a March 27, 2020 "outreach webinar," coupled with "Technical Assistance Questions and Answers,"[10] which were subsequently updated in May 2020. These temporary new rules, as discussed in these various EEOC communications, applied to day-to-day employment for both current employees and applicants, and permitted employers to take actions that normally were not permitted, including:

- Asking employees who report feeling ill at work, or who call in sick, questions about their symptoms (*e.g.*, fever, chills, cough, shortness of breath, sore throat, loss of smell or taste) to determine if they have or may have COVID-19, and barring them from the workplace if they refuse to answer;[11]
- Permitting employers to send employees home or requiring employees to stay home if they have symptoms of COVID-19;[12]
- Measuring an employee's body temperature (despite that some individuals with COVID-19 do not have a fever), and barring the employee if they refuse to have their temperature taken;[13] and
- Administering a COVID-19 test to detect the presence of the virus before permitting employees to enter the workplace on the condition that the tests were "accurate and reliable."[14]

The EEOC underscored that employers were permitted to take similar actions involving applicants after making a conditional job offer, so long as the process was done for all employees in the same type of job.[15] Employers even could delay a start date for an applicant with COVID-19 or symptoms associated with it, and withdraw a job offer when it needed an applicant to start immediately.[16]

Certainly one of the most notable aspects of the EEOC's 2020 COVID-19 guidance was permitting across-the-board taking of temperatures and administering tests to detect the presence of the virus. This permitted practice was unusual based on the EEOC's view that measuring an employee's body temperature is considered a "medical examination" under the ADA, and as a general rule, the ADA prohibits disability-related inquiries or medical examinations "unless they are job-related and consistent with business necessity."[17] Thus, although the EEOC permitted an exception to its normal rules on such "medical examinations," the EEOC did not provide any specific guidance on the protocols to be followed in taking

8 *See* EEOC, *Transcript of March 27, 2020 Outreach Webinar* (herein *"EEOC Webinar"*).
9 *Id. See also Pandemic Preparedness Guidance* at Section II.B.
10 *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
11 See *Pandemic Preparedness Guidance*, Section III.B (Question #6).
12 *Id.* (Question #5); *also see* EEOC Webinar (Question #1).
13 *See Pandemic Preparedness Guidance*, Section III.B. (Question #7); *EEOC Q&As* (Question A.3); *see also* EEOC Webinar (Question #2).
14 Following issuance of the EEOC's *Technical Assistance Questions and Answers on April 17, 2020*, the EEOC added a Q&A on April 23, 2020, permitting such testing, which illustrated that the EEOC rules were continuing to evolve. *See* EEOC Q&As Question A.6.
15 *Id.* (Questions C.1 and C.2).
16 *Id.* (Questions C.3 and C.4).
17 *See Pandemic Preparedness Guidance*, Section I.A.2., which underscores that prior to requiring a medical examination an employer typically needs a "reasonable belief" based on "objective evidence" that an employee's ability to perform essential job functions will be impaired by a medical condition, or an employee will pose a direct threat due to a medical condition.

an employee's body temperature or administering a COVID-19 test, except reminding employers of the requirement to maintain the confidentiality of such records, which are viewed as medical records.[18]

Based on the 2020 guidance, the EEOC has permitted two major exceptions to confidentiality: (1) an employer may disclose the employee's name to a public health official when it learns that the employee has COVID-19, and (2) a temporary staffing agency or contractor may notify the employer if it learns that one of its employees has COVID-19.[19]

b. Unique Rules Dealing with Reasonable Accommodation

An employer's obligations to make reasonable accommodations and engage in the interactive process remain in place based on the EEOC's current guidance. The EEOC's guidance on this issue, however, has continued to evolve as the agency attempts to balance ADA reasonable accommodation obligations with an employer's concern about the "direct threat" to the employee's health and others by returning an employee to the workplace.

The EEOC has addressed numerous issues involving reasonable accommodation in a COVID-19 work environment, including the following:

- If a job can be performed at the workplace only, the EEOC has recommended some accommodations on a temporary basis without causing an undue hardship, such as minor "low cost" physical alterations of the workplace (*e.g.*, one-way aisles, using Plexiglas barriers) or temporary job restrictions on marginal duties, temporary transfers or modified work schedules.[20]
- For employees required to telework, an employer should give "high priority" to reasonable accommodation requests needed while teleworking, but the employer can be proactive and discuss anticipated accommodations that may be needed when returning to work.[21]
- Employers are encouraged to be flexible in terms of requesting medical documentation and/or and engaging in the interactive process. This could include providing accommodations on a temporary basis, and even placing an "end date" on the accommodation.[22] With respect to medical documentation, the EEOC has underscored, "for employers seeking documentation from a health care provider to support the employee's request, they should remember that because of the health crisis many doctors may have difficulty responding quickly. There may be other ways to verify the existence of a disability. For example, a health insurance record or a prescription may document the existence of the disability."[23]
- In making reasonable accommodations, the EEOC also has taken a more realistic view of "undue hardship" based on today's economic climate, explaining that "an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now,"[24] and "the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration."[25] The EEOC's technical guidance underscores that an employer can look to "current circumstances" in determining whether there may be "significant difficulty" in acquiring or providing certain accommodations, particularly for employees who may be teleworking. If a particular accommodation creates an undue hardship, employers and employees are encouraged to work together to determine whether an alternative "could be provided that does not pose such problems."[26]

The EEOC's guidance on reasonable accommodation was updated on May 5, 2020, and supplemented on May 7, 2020, specifically to address concerns involving individuals with "higher risk of severe illness." The agency made a distinction in its approach depending on whether an employee is making a request for an accommodation based on being part of this "higher risk" pool as contrasted with an employer deciding to exclude such employees from the workforce.[27]

In providing guidance on this topic, the EEOC again looked to the CDC guidance regarding those who are expressly identified has having underlying medical conditions creating "higher risk for severe illness."[28]

18 *Id.* (Questions B.1 and B.2).
19 *Id.* (Questions B.3 and B.4).
20 *Id.* (Question D.1).
21 *Id.* (Question D.3 and D.8).
22 *Id.* (Questions D.6 and D.7); *see also* EEOC Webinar (Question #17 and response).
23 *See* EEOC Webinar (Question #17 and response).
24 *See* EEOC Q&As (Question D.9).
25 *Id.* (Question D.11).
26 *Id.* (Question D.10).
27 *See* EEOC Q&As (Questions: G.3, G.4 and G. 5).
28 *See* CDC, *People Who Are at Higher Risk for Severe Illness*, (last reviewed Dec. 1, 2020).

People Who Are at Higher Risk for Severe Illness

COVID-19 is a new disease and there is limited information regarding risk factors for severe disease. Based on currently available information and clinical expertise, **older adults and people of any age who have serious underlying medical conditions** might be at higher risk for severe illness from COVID-19.

Based on what we know now, those at high-risk for severe illness from COVID-19 are:

- People 65 years and older
- People who live in a nursing home or long-term care facility

People of all ages with underlying medical conditions, particularly if not well controlled, including:

- People with chronic lung disease or moderate to severe asthma
- People who have serious heart conditions
- People who are immunocompromised
    - Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- People with severe obesity (body mass index [BMI] of 40 or higher)
- People with diabetes
- People with chronic kidney disease undergoing dialysis
- People with liver disease

Assuming an employee in the "higher risk" group makes an accommodation request, the employer should follow the same approach, discussed above, regarding accommodation requests, whether it comes from the employee or a third party, such as the employee's physician. After receiving a request, an employer can engage in the interactive process with the employee, which may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of their position (that is, the fundamental job duties).[29] The issue of "undue hardship" can then play a role in the equation regarding the employer's approach to the requested accommodation.

On the other hand, in the event an employer is considering keeping an employee out of the workplace because the employee is part of the "higher risk" group, the rules are far stricter. In short, the EEOC requires: (1) application of the "direct threat" standard; and (2) there must be an "individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or the best available objective evidence."[30]

Even assuming that an employee's disability "poses a direct threat to his own health," the EEOC expects employers to explore potential reasonable accommodations absent an undue hardship. The first goal is to find a way, through the interactive process, to return an employee to work while still performing the position's essential functions. When those options are not available, an employer needs to consider other types of accommodations, such as telework, leave or reassignment.[31] Barring an employee from the workplace must be viewed as a last resort, only when "the facts support the conclusion that the employee poses a significant risk of harm to himself that cannot be reduced or eliminated by reasonable accommodation."[32]

The EEOC has provided examples of potential accommodation to eliminate a potential "direct threat" to the affected employee in the "higher risk" group, which may include protective gowns, gloves and other protective gear, erecting

29 *See* EEOC Q&As (Question D.6).
30 *Id.* (Question G.4).
31 *Id.*
32 *Id.*

barriers that provide separation, elimination or substitution of particular marginal functions, modification of work schedules or moving the location where the employee performs work.[33]

3. Infection Control Strategies and Increased Discrimination Risks

The EEOC has placed limits on infection control to the extent that an employer's actions unfairly discriminate against a protected group. As an example, merely because the CDC has identified those 65 years of age and older as being at a higher risk of severe illness if they contract COVID-19 does not justify excluding such workers from the workplace.[34] Similarly, that women who are pregnant face a higher risk for severe illness does not justify the layoff or furlough of such workers.[35]

In short, this guidance is consistent with the EEOC's approach to those in the "higher risk" pool—an employer cannot make generalized assumptions in excluding employees in a protected group from the workplace.

Mistreatment and harassment of Asian Americans and others of Asian descent also has received widespread coverage in the press.[36] Based on these types of concerns, the former EEOC chair cautioned against mistreatment or harassment of these individuals, which can result in unlawful discrimination on the basis of national origin or race.[37] This is similar to the types of warning the EEOC issued in the aftermath of 9/11.[38]

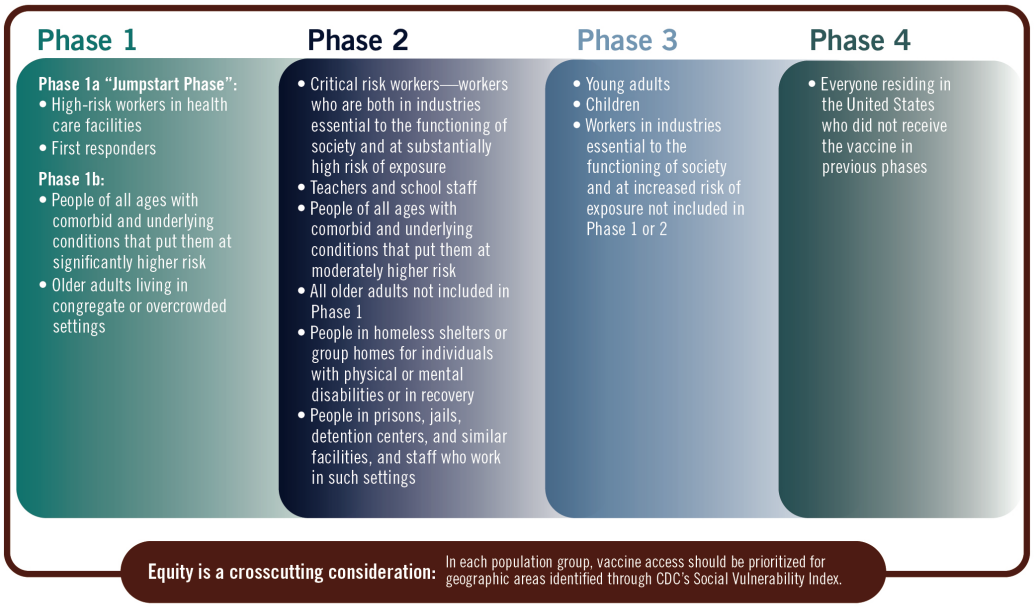
B. The New Evolving Challenge – An Employer's Approach in Dealing with the COVID-19 Vaccine

1. Establishing Employer Policies and Planning for a COVID-19 Vaccine

Many employers are hopeful that the COVID-19 vaccine will be the silver bullet that will enable employers to return to some semblance of a pre-COVID workplace. During 2021, based on the gradual and increased availability of a vaccine, the critical question for the employer community is whether to recommend or mandate employee vaccinations for COVID-19. If mandated, what happens when an employee cannot or will not take the vaccine for religious, medical, or other personal reasons? Can a union or group of workers successfully challenge employer-mandated vaccines? Because the legal landscape involving employee vaccinations is multi-dimensional, this section addresses both EEO issues and other challenges employers must be prepared to address as vaccinations become more widely available. As discussed below, the case developments to date involving vaccination programs have dealt with different types of vaccination programs, particularly vaccines implemented to minimize flu-related risks in the health care field. While the circumstances involving COVID-19 are far different from those related to the flu, these case developments serve as a useful guidepost as employers evaluate the best course of action as COVID-19 vaccinations are developed.

33 *Id.* (Question G.5).
34 *See* EEOC Webinar (Question #11).
35 *Id.* (Question #13).
36 *See, e.g.*, Alexandra Kelley, *Report highlights emerging trends of Asian American discrimination amid coronavirus pandemic*, The Hill.com (Apr. 2, 2020); Alex Ellerbeck, *Over 30 percent of Americans have witnessed COVID-19 bias against Asians, poll says*, NBCnews.com (Apr. 28, 2020); and Yuhua Wang, *Asians are stereotyped as 'competent but cold.' Here's how that increases backlash from the coronavirus pandemic*, The Washington Post (Apr. 6, 2020).
37 *See* EEOC, *Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak* (last visited Dec. 1, 2020).
38 *See* EEOC, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities* (last visited Dec. 1, 2020).

As of the publication of this Annual Report, the availability and priorities for access to the vaccine continue to change. As an example, during the fall of 2020, prior to the vaccine being available, a priority list initially was developed, which provided that access to the vaccine would be a four-phase process that was described as follows:[39]



Source: National Academy of Sciences, Discussion Draft of the Preliminary Framework for Equitable Allocation of COVID-19 Vaccine, http://nap.edu/25914.

As the COVID-19 vaccine became available, those employed in health care and residents of long-term facilities were the first groups to be recommended for receipt of the vaccine.[40] Soon thereafter, the next groups recommended for receipt of the vaccine were front-line "essential workers" and those 75 years of age or older.[41] On December 22, 2020, the CDC highlighted the general priority list as follows:

- During **Phase 1a**, the CDC has recommended that the vaccine first be distributed to: (1) healthcare personnel; and (2) residents of long-term care facilities. According to the CDC, "healthcare personnel are defined as paid and unpaid people serving in health care settings who have the potential for direct or indirect exposure to patients or infectious materials." The CDC has explained, "long-term care facility residents are defined as adults who reside in facilities that provide a variety of services, including medical and personal care, to persons who are unable to live independently."
- The list of those next recommended for receipt of the vaccine in **Phase 1b** are: (1) "frontline essential workers," due to their high risk of exposure; and (2) people age 75 and older, due to their higher rates of hospitalizations and death. "Frontline essential workers" are those "who are in sectors essential to the functioning of society and are at substantially higher risk of exposure" to the COVID-19 virus by virtue of their job responsibilities. This category would include first responders as well as workers in education, food and agriculture, corrections, the U.S. Postal Service, public transit, and grocery stores.
- **Phase 1c** would then focus on: (1) people ages 65-74 years; (2) people between the ages of 16 and 64 who have high-risk medical conditions; and (3) other essential workers. "Other essential workers" would include workers engaged in transportation and logistics, food service, shelter and housing (construction), finance, IT and communications, energy, media, legal work, public safety (engineers), and water and wastewater.

39 *See* National Academies of Sciences, Engineering, and Medicine 2020. *Discussion Draft of the Preliminary Framework for Equitable Allocation of COVID-19 Vaccine*. Washington, DC: The National Academies Press.
40 *See* CDC, ACIP COVID-19 Vaccines Work Group, *Phased Allocation of COVID-19 Vaccines*, ACIP Meeting (Dec. 1, 2020).
41 *See* CDC, *Evidence Table for COVID-19 Vaccines Allocation in Phases 1b and 1c of the Vaccination Program*.

- **Phase 2** includes all other persons ages 16 years and older not already recommended for vaccination in Phases 1a, 1b, or 1c. Currently, in accordance with recommended age and conditions of use (1), any authorized COVID-19 vaccine may be used. ACIP is closely monitoring clinical trials in children and adolescents and will consider recommendations for use when a COVID-19 vaccine is authorized for use in persons younger than 16.42

Nevertheless, the priorities continue to evolve. As an example, on January 12, 2021, the individual serving at the time as Health and Human Services (HHS) Secretary, Alex Azar, announced a new effort to accelerate vaccination by immediately expanding vaccine eligibility to all those age 65 and over, or more than one-third of the U.S. population. Numerous states adopted this recommendation.[43]

Notwithstanding, the role of the federal government to date has been limited to providing access to the vaccine and recommending the priority list for distribution of the vaccine. According to the CDC, "The federal government will determine the amount of COVID-19 vaccine designated for each jurisdiction."[44] Thereafter, "Pandemic vaccination planning is a combined state, territorial, tribal, and local responsibility that requires close collaboration between public health, external agencies, and community partners."[45] Each state has issued their own respective priority lists.[46]

The federal government will continue to play an active role in the vaccination process, particularly focusing on distribution and access to the vaccine, and employers need to monitor closely such developments. As an example, on January 19, 2021, the Biden administration issued a detailed report addressing COVID-19, including strategies dealing with access and distribution of the vaccine.[47]

Even as vaccines become more widely available, the answers to many questions remain unsettled. Are certain vaccines more effective than others? Will the effectiveness of a particular vaccine vary, depending on an individual's health status and/or age? For how long will a vaccine be effective? Are there any side effects that may pose greater risks to certain individuals? In short, there may be a multitude of issues that will need to be addressed as employers weigh their options, and as additional guidance is made available as we move forward with the vaccination program.

From an employment perspective, employers need to take into account a broad range of issues, including but not limited to equal employment opportunity compliance, labor relations, workers' compensation, employee safety and other evolving issues, including the anti-vaccine movement.

2. Employment Opportunity Compliance

As discussed above, the EEOC first issued guidance on *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* in October 2009 after President Obama declared a National Emergency in response to the H1N1 influenza pandemic.48 On March 11, 2020, immediately after the coronavirus was declared a pandemic, the EEOC "re-issued" and updated the previously issued 2009 guidance. At the time of issuance of the 2009 EEOC guidance, the EEOC expressly addressed vaccinations in a Q and A format, similar to other issues discussed in the guidance, and stated as follows:49

42 *See* CDC, *The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine — United States, December 2020* (Dec. 22, 2020).
43 *See* C-Span, News Conference on COVID-19 Vaccine Distribution (Jan. 12, 2021), at *https://www.c-span.org/video/?507916-1/hhs-secretary-azar-announces-covid-19-vaccination-guidelines*.
44 *See* CDC, *Covid-19 Vaccination Program, Interim Playbook for Jurisdiction Operations*, Version 2.0 at 29 (Oct. 29, 2020).
45 *Id.* at 8-14 (Oct. 29, 2020).
46 Littler has developed and maintains an ongoing 50-state compliance list regarding the state priority lists. *See Giving it Our Best Shot – Statewide Vaccination Plans*, Littler Insight.
47 *See National Strategy for the COVID-19 Response and Pandemic Preparedness* (Jan. 2021).
48 *See* Terri M. Soloman and Ronit M. Gurtman, *Planning for a Pandemic: The EEOC Issues Guidance*, Littler Insight (Oct. 27, 2009).
49 *See Pandemic Preparedness Guidance*, Section III.B. Question #13.

> 13. **May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**
>
> No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than *de minimis* cost" to the operation of the employer's business, which is a lower standard than under the ADA).[50]
>
> Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

On December 16, 2020, the EEOC issued guidance on how a COVID-19 vaccination interacts with the legal requirements of the ADA, Title VII, and the Genetic Information Nondiscrimination Act (GINA). The details of the EEOC's updated guidance is summarized below. As we move forward, the EEOC may further clarify certain issues as more is learned about the COVID-19 vaccine.[51]

From an EEO perspective, in dealing with employer vaccination programs, the primary EEO challenges in the past have involved individual failure-to-accommodate claims based on alleged religious discrimination under Title VII and disability discrimination claims under the ADA. (*See* Appendix A – *EEO Challenges to Mandated Employer Vaccination Programs*, for a detailed summary of EEO litigation involving mandatory employer vaccination programs.) Moving forward, we anticipate that the same issues will be in play.

a. Title VII – Religious Discrimination

The EEOC's December 16, 2020 guidance expressly addresses the manner in which an employer should respond to an employee who indicates they are unable to receive a COVID-19 vaccination because of a "sincerely held religious practice or belief":[52]

> Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under *Title VII* of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.
>
> ******
>
> If an employee cannot get vaccinated for COVID-19 because of a … sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to *exclude* the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

50 *Id.* and Footnote 36 in EEOC *Pandemic Preparedness Guidance*, including citation to the *EEOC Compliance Manual* Section 12: Religious Discrimination 56-65 (2008).

51 *See* EEOC Guidance, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Section K, updated on Dec. 16, 2020 (herein "EEOC's December 16 Guidance")..

52 *See* EEOC's December 16 Guidance, Questions K.6 and K.7.

In reviewing an employer's obligations dealing with religious accommodation, the EEOC's December 16 Guidance addressing employee vaccinations needs to be read in tandem with the EEOC's updated Compliance Manual addressing "Religious Discrimination." As discussed therein, the primary concern under Title VII involves the alleged failure to accommodate based on an individual's religious beliefs or practices. With respect to religion, employers must reasonably accommodate an employee's "sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations."[53] Undue hardship under Title VII is a "more than *de minimis* cost" to the employer, which is much a lower burden for the employer to meet than the undue hardship standard under the ADA ("significant difficulty or expense").[54]

When faced with an employee request for an exemption from a mandatory vaccination requirement on the basis of religion or personal belief, employers must assess three questions: (1) is the belief religious? (2) is the belief sincerely held? and (3) would providing a reasonable accommodation impose an undue hardship on the employer?

i. Is The Belief Religious?

The EEOC defines religious beliefs to "include theistic beliefs as well as non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'"[55] The EEOC also clarifies, however, that "beliefs are not protected merely because they are strongly held," but rather religious beliefs generally concern "ultimate ideas" about "life, purpose, and death," as opposed to "[s]ocial, political, or economic philosophies, as well as mere personal preferences" which are not protected as a religious belief under Title VII.[56]

Beliefs do not need to be widely practiced to be religious. A belief can be religious even if no one else practices it. In a recent case involving religious objections to an employer-mandated vaccination requirement, a court denied the employer's motion for summary judgment and held that three employees with unconventional beliefs had "*bona fide*" religious reasons for requesting exemptions.[57] One employee believed that "our bodies are a temple and that God gave us dominion over our bodies" and that "injecting the flu vaccine into her body is morally wrong."[58] Another believed that "followers of her religion are 'healed by plants, fruits, and grains.'"[59] The third believed that "injecting chemicals and diseases into her veins is not something God intends and that it is wrong."[60]

However, if the employer has an "objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information."[61] When in "doubt about whether a particular set of beliefs constitutes a religion," courts will "err on the side of" finding the beliefs to be religious.[62]

In two recent cases, courts have stated that medical objections to mandatory vaccination requirements were not religious in nature, and thus not protected by Title VII. In *Fallon v. Mercy Catholic Medical Center*, a medical center employee's job was terminated because he refused a flu vaccination on the basis of his belief that "one should not harm their own body and [his strong belief] that the flu vaccine may do more harm than good."[63] The court held that the employee's objection to the vaccination was "a medical belief, not a religious one," and thus Title VII did not apply. In early 2020, the U.S. Court of Appeals for the Third Circuit similarly held in a non-COVID-related case that an employee's "concern that the flu vaccine may do more harm than good" and claims that a vaccine was unnecessary because she had "proven to remain healthy due to [her] African Holistic Health lifestyle" constituted a medical, rather than religious, belief.[64]

53 *See* EEOC Compliance Manual, *Section 12: Religious Discrimination*, EEOC-CVG-2021-3 (Jan. 15, 2021) (Herein, "EEOC Religious Accommodation Guidance"). It should be noted that the EEOC updated the guidance on January 15, 2021. *See* EEOC, Press Release, *Commission Approves Revised Enforcement Guidance on Religious Discrimination* (Jan. 15, 2021).
54 *Id.*
55 *See EEOC Religious Accommodation Guidance*, Section 12-I, A.1.
56 *Id.*
57 *EEOC v. Mission Hosp., Inc.*, No. 1:16-cv-00118-MOC-DLH, 2017 U.S. Dist. LEXIS 124183 at *5 (W.D.N.C. Aug. 7, 2017).
58 *Id.*
59 *Id.*
60 *Id.*
61 *See EEOC's December 16 Guidance*, Section K.6.
62 *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475, 1482-83 (10th Cir. 1996); *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990).
63 877 F.3d 487, 492 (3d Cir. 2017).
64 *Brown v. Children's Hosp. of Phila.*, 794 F. App'x 226 (3d Cir. 2020).

Though some courts have distinguished medical beliefs from religious ones, courts have not yet definitively decided the issue of whether a general moral opposition to vaccination is sufficient to trigger Title VII protections.[65] In a recent case, the court allowed a suit to survive summary judgment in order to afford the employee the opportunity to prove that veganism constituted a religious belief, because the court found it "plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views."[66] This case settled out of court and was not ultimately decided on the merits, but it illustrates the fine line between sincere personal beliefs and religious beliefs.

Because the issue of whether a belief is religious is such a nebulous one, employers need to exercise caution in determining too quickly that a specific belief falls outside the scope of a "religious belief."

ii. Is it Sincerely Held?

The EEOC lists four factors to consider in determining whether a belief is sincerely held:

- Whether the employee has behaved in a manner markedly inconsistent with the professed belief;
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- Whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons);
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.[67]

Employers must consider all of these factors, as none is dispositive. This is a heavily fact-specific analysis and employers should be very cautious in evaluating the sincerity of the employee's belief as courts have recognized that an individual's beliefs can change over time.[68]

iii. Undue Hardship Standard

The *EEOC Religious Accommodation Guidance* states that some factors that are relevant to determining whether undue hardship exists include: "the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation."[69] Undue hardship can exist "where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work."[70] Courts have also found that undue hardship can exist if the proposed accommodation would "either cause or increase safety risks or the risk of legal liability for the employer."[71]

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65 The Supreme Court has, however, taken such an expansive view of religion in the context of conscientious-objector provisions to the selective service law. *See United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970) (If "an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time," these beliefs qualify as religious beliefs that would entitle him to an exemption from the draft.).

66 *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 U.S. Dist. LEXIS 182139 (S.D. Ohio Dec. 27, 2012).

67 *See EEOC Religious Accommodation Guidance*, Section 12-I, A.2.

68 *See, e.g., EEOC v. Union Independiente De La Autoridad De Acueductos*, 279 F.3d 49, 56-57 & n.8 (1st Cir. 2002) (evidence that Seventh-day Adventist employee had acted in ways inconsistent with the tenets of his religion, for example that he worked five days a week rather than the required six, had lied on an employment application, and took an oath before a notary upon becoming a public employee, can be relevant to the evaluation of sincerity but is not dispositive; the fact that the alleged conflict between plaintiff's beliefs and union membership kept changing might call into question the sincerity of the beliefs or "might simply reflect an evolution in plaintiff's religious views toward a more steadfast opposition to union membership"); *Hansard v. Johns-Manville Prods. Corp.*, 1973 WL 129 (E.D. Tex. Feb. 16, 1973) (employee's contention that he objected to Sunday work for religious reasons was undermined by his very recent history of Sunday work); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997) (en banc) (Jewish employee proved her request for leave to observe Yom Kippur was based on a sincerely held religious belief even though she had never in her prior eight-year tenure sought leave from work for a religious observance, and conceded that she generally was not a very religious person; the evidence showed that certain events in her life, including the birth of her son and the death of her father, had strengthened her religious beliefs over the years); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994) (that employee had worked the Friday night shift at plant for approximately seven months after her baptism did not establish that she did not hold sincere religious belief against working on Saturdays, considering that 17 months intervened before employee was next required to work on Saturday, and employee's undisputed testimony was that her faith and commitment to her religion grew during this time); *EEOC v. IBP, Inc.*, 824 F. Supp. 147 (C.D. Ill. 1993) (Seventh-day Adventist employee's previous absence of faith and subsequent loss of faith did not prove that his religious beliefs were insincere at the time that he refused to work on the Sabbath).

69 S*ee EEOC Religious Accommodation Guidance*, Section 12-IV, B.1.

70 *See Id.*, Section 12-IV, B.2.

71 *EEOC v. Oak-Rite Mfg. Corp.*, No. 99-cv-1962-DFH, 2001 U.S. Dist. LEXIS 15621, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001). *See also Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998); *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984).

Courts have recently addressed the issue of reasonable accommodation in the specific context of religious discrimination claims and employer-mandated vaccines. In *Robinson v. Children's Hospital*, a court granted summary judgment for the employer hospital, finding that the hospital offered a reasonable accommodation and that exempting the employee from the vaccination would constitute an undue hardship.[72] In this case, after the hospital announced a requirement of influenza vaccinations in patient-care areas, the employee requested an exemption on religious grounds because some vaccines contain pork byproducts. She subsequently objected to any vaccines after learning that her religion had a moratorium on all vaccinations. Although she previously had received a tetanus vaccine, she also alleged that she had an allergic reaction to that vaccine and had additional medical concerns regarding any vaccine.

As an accommodation, the hospital worked with the employee "several times" to try and address her concerns regarding the vaccine, including by encouraging "her to seek a medical exemption and granted her a temporary medical exemption while it reviewed her medical records" on the basis of her claimed allergy to the injection, and by assisting the employee in finding another position in an area of the hospital with no patient interaction, but there were no available positions for which she was qualified. The hospital ultimately deemed her termination a voluntary resignation, which gave her the ability to re-apply for other possible positions in the future. The court also found that simply exempting the employee from the vaccination requirement would have posed an undue hardship because "it would have increased the risk of transmitting influenza to its already vulnerable patient population."

A similar favorable employer outcome arose earlier in 2020 in another non-COVID case. In *Horvath v. City of Leander*,[73] the Fifth Circuit affirmed summary judgment in favor of the employer. In this case, a firefighter who also was an ordained minister, objected to vaccination as a tenet of his religion. The exemption was approved by the Fire Department and the employee was given the option of taking various protective steps, including wearing personal protective equipment to prevent spreading of the flu to himself, co-workers, or patients with whom he may come into contact as a first responder. He also was offered an alternative job. The employee rejected both options, and his employment was ultimately terminated based on the view that his conduct constituted willful disobedience of a directive from a supervisor. In ruling in favor of the employer, the court held that the Fire Department reasonably accommodated the driver/pump operator who refused a TDAP (*i.e.*, Tetanus, Diphtheria, Pertussis) vaccine on religious grounds by offering two accommodation options: (1) reassignment to a different position, "which offered the same pay and benefits and did not require a vaccine," and (2) remaining in the same position if the employee "agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature."[74]

b. ADA and Reasonable Accommodations

i. General Requirements

Under the ADA, employees with an ADA-covered disability may be entitled to an exemption from a mandatory vaccination requirement if their disability prevents them from safely taking the vaccine.

The EEOC's December 16 Guidance expressly addresses the circumstances in which an employee indicates they are unable to receive a COVID-19 vaccination because of a disability.[75] The EEOC's guidance expressly states as follows:

72 Civil Action No. 14-10263-DJC, 2016 U.S. Dist. LEXIS 46024 (D. Mass. Apr. 5, 2016).
73 946 F. 3d 787 (5th Cir. 2020).
74 *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020).
75 *See* EEOC's December 16 Guidance, Questions K.5 and K.7.

The ADA allows an employer to have a *qualification standard* that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *29 C.F.R. 1630.2(r)*. Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent *undue hardship*) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

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If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to *exclude* the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

ii. The ADA and COVID-19

Based on the EEOC's current view, it is "unclear whether COVID-19 is or could be a disability under the ADA."[76] Regardless, in relying on the findings of the CDC and others public health authorities, the EEOC has determined that "an employer may bar an employee with the disease from entering the workplace" because the COVID-19 pandemic meets the "direct threat" standard under the ADA.[77] This determination has resulted in permitting employers significant leeway in developing infection control strategies without violating the ADA that would not be permitted in the absence of a pandemic. Thus, an effective vaccine to immunize individuals from the coronavirus appears to be a strategy worth serious consideration.

In dealing with the ADA and the pandemic, two issues come into play based on the potential use of vaccinations: (1) the standards to be applied in requiring a vaccination, whether it involves applicants or employees; and (2) reasonable accommodations that may be required under the ADA during a pandemic.

iii. Applicable Standard for Requiring Vaccinations

In discussing the applicable legal standard for requiring a vaccination, the EEOC's December 16 guidance makes clear that a primary concern is ADA compliance. Although the EEOC takes the position that the "administration of COVID-19 vaccine" is not a "medical examination,"[78] it determined that ADA factors come into play in various circumstances:

- "Pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability."[79]

76 *See EEOC Webinar*, *supra* note 8.
77 *Id. See also Pandemic Preparedness Guidance* at Section II.B.
78 *See* EEOC's December 16 Guidance, Question K.1. It should be noted that one court has taken a different position. In *Hustvet v. Allina Health System*, 910 F. 3d 399 (8th Cir. 2018), the Eighth Circuit treated a vaccination as a "medical examination" under the ADA and viewed the applicable legal standard in a manner similar to other medical examinations: (1) The ADA permits "medical examinations" (*e.g.* vaccinations) after a conditional offer if all entering employees in the same job category are subject to the same examination; and (2) the ADA permits medical examinations during employment if an employer can demonstrate that they are "job related and consistent with medical necessity." *Hustvet* dealt with employer-required vaccinations for Rubella. The court assumed that the employer's inquiry about employee's vaccinations was a "medical examination" without analysis and resolved the question of whether the employer could require vaccinations by finding that the vaccination was "job-related and consistent with business necessity."
79 *See* EEOC's December 16 Guidance, Question K.2.

- "Thus, if the employer requires an employee to receive the vaccination, administered by the employer [*or a third party with whom the employer contracts to administer the vaccine*], the employer must show that these disability-related screening inquiries are 'job-related and consistent with business necessity.' To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions, and therefore, does not receive the vaccination, will pose a direct threat to the health or safety of her or himself or others."[80]
- "By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the 'job-related and consistent with business necessity' requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (*i.e.*, employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary…If an employee chooses not to answer these questions, the employer may decline to administer the vaccine, but may not retaliate against, intimidate, or threaten the employer for refusing to answer any questions. Second, if an employee receives an employer-required examination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA 'job-related and consistent with business necessity' restrictions on disability related inquiries would not apply to the pre-vaccination medical screening questions."[81]
- "The ADA requires employers to keep any employee medical-related information obtained in the course of the vaccination program confidential."[82]

iv. Reasonable Accommodation Under the ADA

Based on a review of the EEOC's guidance issued in the spring of 2020, in dealing with a pandemic, two fundamental principles need to be considered in addressing reasonable accommodation in a COVID-19 environment:

- Employers are encouraged to be flexible in terms of requesting medical documentation and/or and engaging in the interactive process. This could include providing accommodations on a temporary basis, and even placing an "end date" on the accommodation.[83] With respect to medical documentation, the EEOC has underscored, "for employers seeking documentation from a health care provider to support the employee's request, they should remember that because of the health crisis many doctors may have difficulty responding quickly. There may be other ways to verify the existence of a disability. For example, a health insurance record or a prescription may document the existence of the disability."[84]
- In making reasonable accommodations, the EEOC also has taken a more realistic view of "undue hardship" based on today's economic climate, explaining that "an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now,"[85] and "the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration."[86] The EEOC's technical guidance underscores that an employer can look to "current circumstances" in determining whether there may be "significant difficulty" in acquiring or providing certain accommodations, particularly for employees who may be teleworking. If a particular accommodation creates an undue hardship, employers and employees are encouraged to work together to determine whether an alternative "could be provided that does not pose such problems."[87]

The EEOC's December 16 guidance further elaborates on the approach that should be taken in handling requests for accommodations:[88]

80 *Id.*
81 *Id.*
82 *Id.*
83 *See* EEOC Q&As (Questions D.6 and D.7); *see also* EEOC Webinar, *supra* note 8.
84 *See* EEOC Webinar (Question #17 and response).
85 *See* EEOC Q&As (Question D.9).
86 *Id.* (Question D.11).
87 *Id.* (Question D.10).
88 *See* EEOC's December 16 Guidance, K.5.

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. In discussing accommodation requests, employers and employees also may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, *www.askjan.org*. JAN's materials specific to COVID-19 are at *https://askjan.org/topics/COVID-19.cfm*.

Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, but as explained further in *Question K.7.*, there may be situations where an accommodation is not possible. When an employer makes this decision, the facts about particular job duties and workplaces may be relevant. Employers also should consult applicable Occupational Safety and Health Administration standards and guidance. Employers can find OSHA COVID-specific resources at: *www.osha.gov/SLTC/covid-19/*.

Managers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for *requesting an accommodation*.

c. Practical Takeaways Dealing with the EEOC Guidance

While the above discussion reviews the various issues that need to be considered in dealing with EEO-related issues tied to the COVID-19 vaccine, particularly when dealing with mandatory vaccinations, the following is a practical checklist of key takeaways that employers generally need to take into account based on the EEOC's December 16 guidance on the COVID-19 vaccine:

Impact of EEOC in Vaccination Process. The EEOC and federal discrimination laws come into play in setting the ground rules that employers need to keep in mind to avoid claims of disability discrimination and religious discrimination, particularly circumstances in which an employee claims that they cannot be vaccinated. Most of the issues/concerns have arisen under the ADA to the extent that medical/health-related inquiries are tied to vaccinations. The EEOC attempted to provide some clarity to employers based on Guidance issued on December 16, 2020, and there are four key takeaways based on the EEOC's Guidance:

- Point #1: Getting vaccinated is not viewed as a "medical examination" under the ADA. What is the impact of this view by the EEOC?

  (1) An employer does not have to demonstrate that any vaccination requirement is "job related or consistent with business necessity," which is required whenever an employer requests a medical examination of an employee.

  (2) An employer has the right to request to request "proof of receipt of a COVID-19 vaccination." *(Note: ADA risks arise if an employer asks "why" the employee cannot do so.)*

  (3) The caveat: The EEOC determination that a vaccination is not a "medical examination" only eliminates the threshold issue of requiring a vaccination; it does not eliminate the potential exceptions to being vaccinated based on a disability or religious beliefs.

- Point #2: If a vaccination is offered on a voluntary basis (*i.e.*, employee chooses whether or not to be vaccinated), the ADA requires that the employee's answers to pre-screening, disability-related questions also must be voluntary. In the view of the EEOC, "If an employee chooses not to answer these questions, an employer may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions."

  (1) The key is that care must be taken not to retaliate or discriminate against that employee in any manner.

  (2) An employer also needs to take care to avoid claims of disparate treatment and just as importantly, if word gets out, it needs to make certain that an employee is not stigmatized or harassed by fellow employees for not getting vaccinated.

  (3) For that reason, it may be in an employer's best interest to keep vaccination-related information confidential to minimize such risks.

- Point #3: Mandatory vaccinations are permissible, but care must be taken based on excluding an employee from the workforce who indicates that they cannot receive the COVID-19 vaccination due to a disability. Employers need to be aware of the EEOC's cautionary statement in its Guidance: "...the employer must show that an unvaccinated employee would pose a direct threat due to a significant risk of substantial harm to the health or safety of the individual or others that could not be eliminated or reduced by reasonable accommodation." Four steps need to be considered:

  (1) First, per the EEOC, an individual assessment must be made whether a direct threat exists based on an employee not being vaccinated. As an example, if employees already have been working on site prior to any vaccination mandate, the direct threat standard may be hard to meet.

  (2) Second, even if a direct threat can be shown, an employer has to determine whether a reasonable accommodation can be made to enable the employee to stay on the premises, even if not vaccinated.

(3) Third, if a decision is made that an employee cannot remain on the premises, an employer has to evaluate how else the employee can be accommodated – such as permitting the employee to work remotely or being put on a leave of absence.

(4) Finally, if an employer cannot make those accommodations, the EEOC cautions, "This does not mean that the employer may automatically terminate the workers. Employers will need to determine if any other rights apply under the EEO laws or other federal, state and local authorities."

- Point #4: Similar to disabilities, the EEOC takes a similar view based on any employee who indicates that they are unable to be vaccinated because of a "sincerely held" religious belief or practice.

(1) In short, similar to the ADA, reasonable accommodation is required if an employee states that they cannot be vaccinated based on religious grounds.

(2) An employer ordinarily should assume the employee's request is based on a sincerely held religious belief, and

(3) If an employer has an "objective basis" to question the religious nature or sincerity of the request, the employer can ask for supporting documentation.

(4) As a practice pointer, although there is a lower burden to establish "undue hardship" dealing with religious accommodations, the EEOC uses identical language, grouping religious accommodation with the ADA in cautioning against an employer's terminating an employee who cannot get vaccinated based on their religious beliefs.

Final Comments on EEOC Guidance: There is more to the guidance, and employers are encouraged to review the guidance, but the above discussion highlights some of the key issues of concern for employers.

d. Other Relevant Statutory Schemes

i. Pregnancy Discrimination Act

Employers should also consider their obligations under other statutory schemes. For example, the Pregnancy Discrimination Act (PDA) offers similar protections as the ADA to employees with temporary disabilities related to their pregnancy or childbirth. Accordingly, a pregnant employee may have a qualifying disability that prevents her from taking a potential COVID-19 vaccine. As with an ADA-qualified employee, employers should consider all possible reasonable accommodations it can feasibly offer to an employee covered by the PDA, including a leave or an exemption from the vaccination requirement for the duration of the pregnancy-related disability.

ii. Workers' Compensation Risks

In considering whether to mandate vaccination, employers may be faced with a seeming catch-22 between the potential dangers faced by employees in either requiring or not requiring vaccination. At this point it is unclear whether a potential vaccine may cause side effects or adverse reactions in certain segments of the population, which also may create risks for employers. As an example, in dealing with other types of vaccinations, the California Supreme Court has held:

> ... the presence of an industrial injury is not always a prerequisite for compensability where injury results from the medical care which was required by the employer. The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable under the Workers' Compensation Act.[89]

Thus, mandatory vaccinations may lead to potential workers' compensation claims from employees who suffer an adverse reaction to a potential vaccine. However, care must be taken in dealing with worker's compensation issues

89 *See Maher v Workers' Compensation Appeals Board*, 33 Cal. 3d 729, 661 P.2d 1058, 190 Cal. Rptr. 904 (Cal. 1983).

because this issue is state-law driven. Specifically, whether a contagious disease qualifies as being compensable injury may depend on applicable state law, and it may not be viewed as compensable.[90]

iii. Occupational Safety and Health Act

On January 29, 2021, OSHA posted guidance entitled, "Protecting Workers: Guidance on Mitigating and Preventing Spread of COVID-19 in the Workplace." In this document, OSHA provided general guidance on what workers need to know about COVID-19 protections in the workplace and discussed the roles of employers and workers in responding to COVID-19. In discussing the "most effective COVID-19 prevention programs," OSHA included only minor reference to the COVID-19 vaccine, stating the prevention programs should include:[91]

- ***Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees.*** Provide information and training on the benefits and safety of vaccinations.
- ***Not distinguishing between workers who are vaccinated and those who are not:*** Workers who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant, because at this time, there is no evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person. The *CDC explains* that experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19.

Thus, it seems clear that robust workplace safety policies, particularly those following the above-referenced guidelines, even in the absence of an employer vaccination mandate, will meet the employer's obligation under the OSH Act's General Duty Clause, particularly based on OSHA's current views.

iv. National Labor Relations Act, Bargaining Obligations, and Free Speech Considerations

There is a strong likelihood that employers may face challenges in the event that an employer mandates vaccinations in a union-represented work environment. As former NLRB General Counsel Peter Robb recently noted in a memorandum outlining bargaining obligations in emergency situations:

> [t]he Coronavirus pandemic has promoted many questions regarding the rights and obligations of both employers and labor organizations, particularly in light of responsive measures taken to contain the virus … [s]ometimes these measures have been taken of prudence; other times they have been required by state, local or federal orders.[92]

Even prior to a vaccine being developed for COVID-19, employers already have faced challenges in a unionized work environment, as best illustrated by a recent unfair labor practice claim filed after an employer announced its plan to require employees to record COVID-19-related symptoms on an app.[93] Screening apps are among the tools employers are using to take preventive steps to curb the spread of the coronavirus. After the employer announced plans to adopt use of the app, a union employee raised concerns that the app would "diminish their data privacy" and the employer "gave no clear alternatives to downloading it on their personal devices." Employees also raised concerns regarding whether the app would do more harm than good "by creating a false sense of security."[94] An unfair labor practice was filed with the NLRB on August 26, 2020.[95] The charge was later withdrawn.[96]

In evaluating the potential risks in mandating a vaccine in a unionized environment, the most frequent focus in recent years has been health care institutions requiring vaccines of health care workers based on concerns of

90 *See* Larson's Spotlight, Exposure to Contagious Disease. (May 3, 2009). Retrieved from *http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2009/05/03/larson_2700_s-spotlight_3a00_-exposure-to-contagious-disease.aspx*
91 OSHA, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* (Jan. 29, 2021).
92 Memorandum GC 20-04 (Mar. 27, 2020).
93 *See* Julia Jacobs, N.Y. Times (Aug. 26, 2020) at *https://www.nytimes.com/2020/08/26/arts/design/natural-history-museum-coronavirus-app.html*.
94 *Id.*
95 NLRB Case No. 02-CA-265257 (Filed: 8/25/20).
96 NLRB Case No. 02-CA-265257 (Letter Approving Withdrawal Request filed 9/8/20).

flu-related risks and obvious concerns in a health care setting.[97] In implementing such mandatory programs, aside from discrimination claims, employers have been faced with other challenges, particularly by unionized health care workers, claiming that implementing such policies is not permissible without first bargaining over implementation of a mandatory vaccination program. While there has not been an extensive amount of litigation or related challenges, the discussion below about one particular long-litigated NLRB and arbitration matter, highlights some of the bargaining and contract coverage issues that unionized employers need to consider when evaluating mandatory vaccination and/or testing policies.

In *Virginia Mason Hospital*, 357 NLRB 564 (2011), a Seattle-based hospital announced that it was amending its "Fitness for Duty" policy to require its entire workforce to be immunized against the flu. The union grieved the policy and submitted the matter to arbitration. Subsequently, an arbitrator issued an award in favor of the union. In conformity with the award, the hospital did not require the nurses to be immunized.[98] The hospital, however, implemented a new policy that required non-immunized nurses either to wear a protective facemask or to take antiviral medication. The union responded with an unfair labor practice charge claiming that the hospital violated Section 8(a)(5) of the Act by failing to bargain in good faith through the unilateral issuance of the policy. The hospital advanced several defenses to the 8(a)(5) unilateral-change allegation during the ALJ trial. It contended that it had no duty to bargain before implementing its flu-prevention policy because (a) the policy went to the hospital's "core purpose" and was exempt from mandatory bargaining under *Peerless Publications*, 283 NLRB 334 (1987); (b) the decision to implement the policy was subject to the balancing test the Supreme Court set forth in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and applying that test, the balance tipped in favor of exempting the decision from mandatory bargaining; (c) federal and state law required the hospital to implement effective policies to control infection and communicable diseases; and (d) the union waived bargaining when it agreed to the management-rights and zipper clauses of the parties' collective-bargaining agreement.

Without analyzing the hospital's other defenses, the ALJ held that the employer was excused from its bargaining obligation based on the test set forth in *Peerless Publications*, 283 NLRB 334 (1987), as: (1) the policy went directly to the employer's core purpose: to protect patient's health; (2) the policy was narrowly tailored to prevent the spread of influenza; and (3) the employer limited the requirement to nurses who refused to be immunized. The Board, however, reversed and held that the hospital violated Section 8(a)(5) by unilaterally implementing the flu-prevention policy without affording the union notice and opportunity to bargain. The Board remanded the case back to ALJ to consider other defenses raised by the hospital, including whether the union waived its right to bargain through adoption of the current collective bargaining agreement.

Subsequently, the ALJ issued a supplemental decision finding that the union waived its right to bargain over the flu-prevention policy when it agreed to, among other things, the management-rights provision in the parties' collective bargaining agreement.[99] The management-rights provision endowed the hospital with an enumerated set of explicit rights. Under that clause, the union:

> recognizes the right of the Hospital to operate and manage the Hospital, including but not limited to the right to require standards of performance and . . . to direct the nurses . . . to determine the materials and equipment to be used; to implement improved operational methods and procedures . . . to discipline, demote or discharge nurses for just cause . . . and to promulgate rules, regulations and personnel policies.

97 Annual vaccination of health care workers against influenza has been recommended by the CDC since 1984. *See* Centers for Disease Control and Prevention. Prevention and control of influenza. MMWR Morb Mortal Wkly Rep 1984; 33:253–60, 265–6, as cited in Michael B. Edmond, *Mandatory Flu Vaccine for Healthcare Workers: Not Worthwhile* (Apr. 17, 2019). *See also* CDC guidance, *Influenza Vaccination Information for Health Care Workers*. It should be noted that there are various required vaccinations based on applicable state law for various conditions. As an example, currently 18 states establish flu vaccination requirements for hospital healthcare workers (*e.g.*, California, Colorado, Georgia, Illinois, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, and Utah.) These laws establish requirements based on the hospital type and the type of vaccination requirements. In addition, some state laws allow for vaccination exemptions. *See* Menu of State Hospital Influenza Vaccination Laws, at *https://www.cdc.gov/phlp/docs/menu-shfluvacclaws.pdf*.

98 *Washington State Nurses Assn. v. Virginia Mason Hospital*, FMCS 05-53154 (Aug. 8, 2005) (Escamilla, Arb.). The arbitrator's decision was upheld by both the federal district court and the Ninth Circuit. *See Virginia Mason Hospital v. Washington State Nurses Assn.*, No. C05- 1434MJP, 2006 WL 27203 (W.D. Wash. 2006), *aff'd*, 511 F.3d 908 (9th Cir. 2007).

99 *Virginia Mason Hospital*, 358 NLRB 531 (2012). Notably, the ALJ determined that the hospital was unable to identify "a single Federal or State law or regulation mandating that registered nurses who are not immunized against influenza or not take antiviral medication be required to wear facemasks at all times when exposed to patients or members of the public."

While the management-rights clause at issue did not specifically mention the wearing of facemasks, it specifically allowed the Hospital to unilaterally "direct the nurses" and "to determine the materials and equipment to be used; [and] to implement improved operational methods and procedures." Applying the "clear and unmistakable" waiver standard in place at the time, the ALJ concluded that the union waived its right to bargain based on: (1) language in the management rights clause; (2) internal hospital policies; and (3) testimony that the hospital was required to have injection control policies in place, that it never bargained with the union over those policies, and that the union never objected to them. The Board affirmed the ALJ's decision.[100]

There are several practical takeaways from grievance and unfair labor practice litigation involving *Virginia Mason Hospital*. For starters, employers with union-represented employees need to review carefully existing collective bargaining agreements to determine whether there is sufficient management rights language that would permit an employer to mandate vaccinations as a condition of employment.[101] While the hospital ultimately prevailed in the implementation of its revised flu-prevention policy consisting of a choice between masks or antiviral medication, it was unable to establish to the arbitrator that the collective bargaining agreement allowed it to impose mandatory vaccinations.[102] Furthermore, to the extent an employer seeks to avoid a bargaining obligation by claiming that a mandatory vaccination is consistent with a local, state, or federal law/regulation, it will need to need to show that it is actually mandated by the government to require such vaccination. Virginia Mason Hospital made that argument concerning its flu-prevention policy but could not show a nondiscretionary government mandate. The NLRB has well established that an employer has no duty to bargain over a nondiscretionary change in terms and conditions of employment mandated by federal, state, or local law.[103] However, "when an employer has discretion over how to implement certain changes in employee wages, hours, or other terms and conditions of employment mandated or imposed on it by statute or regulation, it has a duty to notify and bargain with the employees' representatives over how such changes should be implemented before making any such changes."[104]

Even if an employer can mandate vaccinations under state law or regulation, or a collective bargaining agreement, there may be procedural issues that require collective bargaining. For example, subject to what is provided in the government mandate or authorized by the CBA, employers may have to bargain issues such as:

- Which classes of employees are subject to vaccination and in which order?
- Who will perform the vaccination?
- What if an employee refuses the vaccination?
- Will there be disciplinary penalties or other consequences?
- Where will the vaccination occur?
- Will it be on the employee's shift?
- Will additional compensation or other incentives be provided?

100 *Id.*

101 While NLRB law has changed from time to time, to establish waiver of a statutory right to bargain over mandatory subjects, there generally must be a clear and unmistakable relinquishment of that right. Waivers can occur in any of three ways: (1) by express contract language, (2) by the parties' conduct (including past practice, bargaining history, and action or inaction), or (3) by a combination of the two. The legal principles governing waiver by inaction are well established: before implementing a change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. It is then incumbent upon the union to act with due diligence in requesting bargaining.

102 Following a union grievance over the mandatory vaccination program by Virginia Mason Hospital, the arbitrator sustained the grievance and ordered rescission of the required vaccination protocol from the "fitness for duty" policy. The arbitrator concluded that the management rights clause only covered operational decisions, not policies that directly affected terms and conditions of employment. As significantly, the arbitrator rejected application of a so-called "zipper clause" (*i.e.*, reserving to management all matters not specifically discussed during negotiations or included in the collective bargaining agreement, taking the view that filing a grievance over the policy was "sufficient negotiation or discussion of the issue such that it was not waived"). After Virginia Mason filed an application in federal court, seeking to vacate the arbitration award, the district court: (1) rejected the argument that the arbitrator had exceeded his authority; (2) concluded that the arbitrator's view of the collective bargaining agreement was plausible; and (3) the employer did not show that "any explicit, well-defined, and dominant public policy that was contravened by the arbitrator's decision." On appeal, the Ninth Circuit rejected the employer's arguments based on the union contract, including the management rights clause and zipper clause, thus finding that the arbitrator's decision "was not procedurally unsound because of any failure to apply relevant provisions of the CBA." *Virginia Mason Hospital v. Washington State Nurses Association*, 2005 WL 6288744 (W.D. Wash. Aug. 19, 2005), *aff'd* 511 F. 3d 908, 912-14 (9th Cir. 2007).

103 *Long Island Day Care Services*, 303 NLRB 112, 117 (1991); *Lifeway Foods, Inc.*, 2016 NLRB LEXIS 806, *33 (2016); *see also* July 13, 2017 letter from NLRB Office of Appeals in *Save Mart Supermarkets*, Case 20-CA-170581 (denying union's appeal because employer had no discretion to depart from California's mandatory 24-hour paid sick leave statute and had no obligation to negotiate with the union over its decision to implement the state-mandated leave).

104 *Pacific Maritime Association*, 2019 NLRB LEXIS 263, *101 fn. 28 (2019); *Long Island*, 303 NLRB at 117; *Wexford Health Sources, Inc.*, 2014 NLRB LEXIS 684, **48-49 (2014).

- Will the employer provide additional paid or unpaid time off if an employee suffers an adverse reaction?
- Can an employer insist on a release?

Where there is no government mandate and/or CBA provision expressly authorizing an employer to mandate vaccinations, employers that wish to require vaccinations should consider requesting mid-term collective bargaining and bargain to impasse.

Finally, regardless of whether there is a bargaining obligation, getting the support of the applicable union may impact the success of a vaccination program. For that reason, early outreach to the applicable collective bargaining representative may be helpful in implementation of an employee vaccination program.

v. Dealing with Challenges Based on the Anti-Vaccination Movement and Other "Protected Concerted Activity"

Even in a non-union environment, employers need to brace themselves for those already part of the "anti-vaccine movement," or who may have concerns regarding the safety of a vaccine for the coronavirus. As an example, one group's website "attacks Anthony Fauci, director of the U.S. National Institute of Allergy and Infectious Diseases for 'risky and uncertain coronavirus vaccines' into development as part of a 'sweetheart deal' for drug companies."[105]

To the extent that an employee or group of employees mobilizes co-workers to challenge mandatory vaccines being imposed by an employer, this could be viewed as "protected concerted activity" under Section 7 of the National Labor Relations Act (NLRA) even in the absence of a union and result in potential unfair labor practices being filed against the employer.[106] Section 7 of the NLRA provides that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[107] The "mutual aid or protection" clause focuses on the goal of concerted activity and "whether there is a link between activity and matter concerning the workplace or employees' interests as employees."[108] Further, this clause covers employee efforts to "improve their lot as employees through channels outside the immediate employee-employer relationship" as well as activities "in support of employees of employers other than their own."[109] This means that an employer generally may not prohibit conversations or conduct related to working conditions, evening if those actions are couched in terms of political or current events. Thus, employees may engage in protected political activity under the NLRA so long as it relates to labor or working conditions, and such advocacy can include contacting legislators, testifying before government agencies, or joining protests and demonstrations.[110]

Employee speech related to mandated vaccinations may be viewed by the NLRB as having a direct nexus to employees' interest as employees as the vaccinations would be considered a term or condition of employment. Indeed, there have been recent activities by labor organizations to capitalize on safety-related concerns posed by COVID-19, as illustrated by recent efforts by the Communications Workers of America, with their website: "COVID-19: FAQ for Engaging in Protected Concerted Activity to Stay Safe from COVID-19 at Work." This website includes "COVID-19 Information for Non-Union Workers."[111]

The scope of protection based on state legislation involving protected "political activities" also may be relied on by groups of workers in selected jurisdictions. Several states have laws that prohibit employers from taking adverse action against employees because of their off-duty lawful political activities. In California, employers may not coerce employees, discriminate or retaliate against them, or take any adverse action because they have engaged in political activity.[112] Similar prohibitions exist in other states, including Colorado, Louisiana, New York, South Carolina, and Utah.

105 *See* Liz Szabo, *How Anti-Vaccine Activists are Using COVID-19 to Boost Their Movement*, Spectrum, Kaiser Health News (Apr. 28, 2020).
106 29 U.S.C. 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .")
107 *Id.*
108 *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip. op. at 3 (Aug. 11, 2014).
109 *Eastex, Inc. v. NLRB*, 437 U.S. 556, 559-60, 565 (1978) (upholding Section 7 protection for distribution of literature that, *inter alia*, urged employees to vote for candidates supporting a federal minimum wage increase and to lobby legislators against incorporation of right-to-work statute into state constitution).
110 See NLRB Advice Memorandum, Case 07-CA-193475 (Aug. 30, 2017) (finding employees to be engaged in protected activity where employees walked off the job in support of "Day without Immigrants" demonstration).
111 *See* Communication Workers of America, *COVID-19: FAQ for Engaging in Protected Concerted Activity To Stay Safe From COVID-19 at Work*.
112 Cal. Lab. Code §§ 98.6(a), 1102.

Connecticut actually extends First Amendment protection of free speech to the employees of private employers.[113] Some of these laws provide exceptions for public or religious employers or for off-duty employee conduct that creates a material conflict with respect to the employer's business interests. Under such laws, and absent some exception, adverse employment actions because of lawful, off-the-clock political activity would be illegal. Employers, however, should be mindful of free speech-type claims when taking action against employer for off-duty conduct and social media postings.

vi. Privacy and Public Policy Concerns

Finally, employers should be aware of potential privacy and public policy concerns. In a recent action, although in a non-union environment, a healthcare employee filed a putative class action on behalf of himself and others against a health care facility, and a network of hospitals and healthcare facilities in South Carolina, claiming that mandatory flu vaccination requirements constituted an unreasonable invasion of privacy under that state's constitution and common law.[114] The employer's "Influenza Immunization Protocol" provided that "unless an approved exemption is made," the flu vaccination will be "a condition of initial and continued employment" for all employees. The Protocol permitted employees to request an exemption from the immunization requirement, but only for conditions listed in the guidelines from the CDC, which included: severe egg allergy, severe allergy to any component of the vaccine, a past severe reaction to the influenza vaccine, or a history of Guillain-Barre syndrome. The Protocol required employees who were unvaccinated because of an exemption to wear surgical masks while on duty if they had direct patient contact, or, if they did not have direct patient contact, when they were within six feet of another individual. Employees without an approved exemption who were not immunized or who violated any of the protocol requirements had the choice of resigning or having their jobs terminated.

The South Carolina lawsuit sought to enjoin the health care entity from implementing or enforcing its Influenza Immunization Protocol, alleging that the Protocol violated South Carolina's public policy and Article 1, §10 of the state constitution, which prohibits "unreasonable invasions of privacy." The employer issued a statement noting that thousands of Americans die as a result of the flu and flu-related illnesses, and that the immunization policy was issued in an effort to "reduce the risk of infection and in turn help save the lives of those we care for and those we care about." Three months later, the suit was dismissed for "failure to prosecute."

Although this case did not move forward, it is conceivable that similar suits based on privacy rights or public policy grounds may arise. The potential outcome may depend on the applicable facts and state law at issue.

Our preliminary analysis under most, if not all, state privacy laws is that none of them will restrict various vaccination programs that may be implemented based on the COVID-19 vaccine. Typically, the employer or the provider can ask for health information in connection with a vaccine. If the employee refuses to provide the information, there is no privacy issue. The employee has disclosed no private information. If the employee responds, the employee consents to the disclosure, and there is no privacy risk as consent is a defense to any privacy-based claim.

Federal and state law, however, imposes restrictions on how the employer uses and discloses vaccination-related information. First, questions about contraindications to the vaccine likely constitute a medical examination under the ADA. Therefore, the information about contraindications likely qualifies as confidential medical records protected by the ADA. Moreover, maintaining this information puts the employer at risk of claims alleging that the employer discriminated against the employee based on the employer's knowledge of the employee's health conditions revealed by contraindication information.

To reduce the risk of handling this information, employers should arrange for the health care provider that administers the vaccine to manage this information and avoid collecting it themselves, if practical. If the employer does collect this information, it should be maintained as a confidential medical record separate from the

113 Conn. Gen. Stat. § 31-51q. The statute applies broadly to any content that "addresses as a matter of public concern." *Daconto v. Trumbull Housing Authority*, No. CV-03-4007847-S, 2008 Conn. Super. LEXIS 251, at *43 (J.D. Ansonia-Milford, Jan. 31, 2008) (protected speech includes discussing health and safety of other employees).

114 *See Bertha Hunter v Ahmed Health*, Case No. 2010 CP 0403433 (S.C. Court of Common Pleas, Filed 9/24/10), as discussed in George E. O'Brien Jr., *Healthcare Workers Again Challenge Mandatory Flu Vaccinations*, Littler ASAP (Oct. 13, 2010).

personnel file. The employer should safeguard this information and disclose to third parties only under very limited exceptions to the ADA.

Although the EEOC's guidance indicates that it does not consider the record of COVID-19 vaccination itself to be a confidential medical record, vaccination status potentially could constitute health information under some states' laws. Therefore, the employer should provide reasonable safeguards for vaccination records. These safeguards should include data security provisions in the service agreement with any vendor that handles this information. In particular, the employer should require data security safeguards from the provider that administers the vaccine, if feasible.

Generally, the employer can release COVID-19 vaccination records to third parties. To reduce the risk of claims of invasion of privacy, however, the employer should notify employees that the employer may disclose an employee's vaccination status to third parties, including, if applicable, to customers. If provided at the time of obtaining the vaccination record, the notification should undermine employees' reasonable expectations of privacy in the information.

If the employee is in California, the California Confidentiality of Medical Information Act (CMIA) prohibits the company from disclosing the medical information of employees without an authorization except in very limited circumstances.[115] Despite the EEOC's view that the administration of a COVID-19 vaccine is not viewed as a medical examination, it is not entirely clear whether vaccination status constitutes medical information under the CMIA. Employers may wish to take the conservative approach of treating it as medical information.

Although ambiguous, Texas's Medical Records Privacy Act likely prohibits employers from disclosing vaccination records in electronic form to third parties without the authorization of the employee. Finally, Connecticut prohibits the disclosure of personnel records to third parties without employee consent except under very narrow circumstances.

Finally, employers should take care because employees may view their vaccination status as private information and expect or desire that employers refrain from disclosing their vaccination information to third parties. This could lead to invasion of privacy claims from employees if the employer discloses vaccination status to third parties. Most states provide a right of action for the tort of Publication of Private Facts, under the common law or encoded in statutes. Given the generally legitimate interest in knowing an individual's vaccination status, employees typically would have a weak claim. To reduce the risk further, however, the employer should undermine the employees' expectation of privacy by notifying employees at the point of collecting vaccination information that the employer may share this information with third parties.

C. Conclusion

Over the past year, employers have faced a broad range of challenges dealing with COVID-19, including virus control strategies to curb the spread of the virus. These have included erecting physical barriers and related environmental controls, wearing masks, restricting access to work in circumstances in which employees have COVID-19 or symptoms related to the virus, and implementing remote-work arrangements, just to name a few.

Whether availability of a vaccine to protect individuals from the virus will be the silver bullet to eliminate the spread of the virus remains to be seen, but the issue of vaccinations for COVID-19 will be front and center throughout calendar year 2021.We currently recognize that rollout of vaccines for COVID-19 will continue to occur in phases, and access by all may not occur until at least the summer or fall of 2021. We also will continue to learn more as further refinements are made and distribution moves from "Emergency Use Authorization" (EUA) to full approval of each COVID-19 vaccine by the Food and Drug Administration (FDA). This clearly is not a situation of "one size fits all," and employers in certain sectors, particularly health care, may conclude that adoption of mandatory vaccinations is in the best interests of both employees and patients, particularly following FDA approval of any vaccine. As referenced above, even in circumstances of mandatory vaccinations by an employer, accommodations may be required for certain workers.

Alternatives to mandatory vaccination programs clearly need to be considered. An employer's approach may vary based on the nature of the employer's operation, but this clearly is not a situation in which one size fits all, and many employers may be better served by considering other options based on the numerous potential challenges posed by implementing mandatory vaccination policies. First, employers may need to accommodate those seeking an exemption on religious grounds or based on

115 Cal. Civ. Code § 56.20(c).

a disability or pregnancy that may pose a medical risk based on receiving the vaccine. This could be compounded by groups of employees challenging the vaccine on political grounds as part of the anti-vaccination movement, employee concerns about potential short-term and/or long-term medical risks caused by the vaccine, or even labor organizations in unionized settings opposed to the unilateral implementation of an employer's vaccination policy. In addition, if the vaccine causes any adverse effects, an employer could face workers' compensation or other potential claims.

Based on all these considerations, various employers may want to consider initially encouraging vaccinations on a voluntary basis as more is learned over the coming year. In the event that various incentives are considered, such options should be carefully reviewed with legal counsel.

We hope this opening chapter serves as a useful resource as employers evaluate their various options in dealing with the COVID-19 vaccine.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

As it did for the first time in FY 2019, the EEOC issued two separate reports providing financial and performance metrics for FY 2020. In November, the Commission published its Agency Financial Report (FY 2020 AFR).[116] In early 2021, the EEOC issued its FY 2020 Annual Performance Report (FY 2020 APR).[117] According to the EEOC's records, the Commission received 67,448 private-sector charges during this past fiscal year.[118] This figure represents a 7.19% decrease from the number of charges filed in FY 2019. As shown by the following chart, the number of charges filed in FY 2020 continues to represent a downward trend in the number of overall private-sector charges filed with the Commission.

Fiscal Year	Number of Charges	% Increase/Decrease
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%
2020	67,448	-7.19%

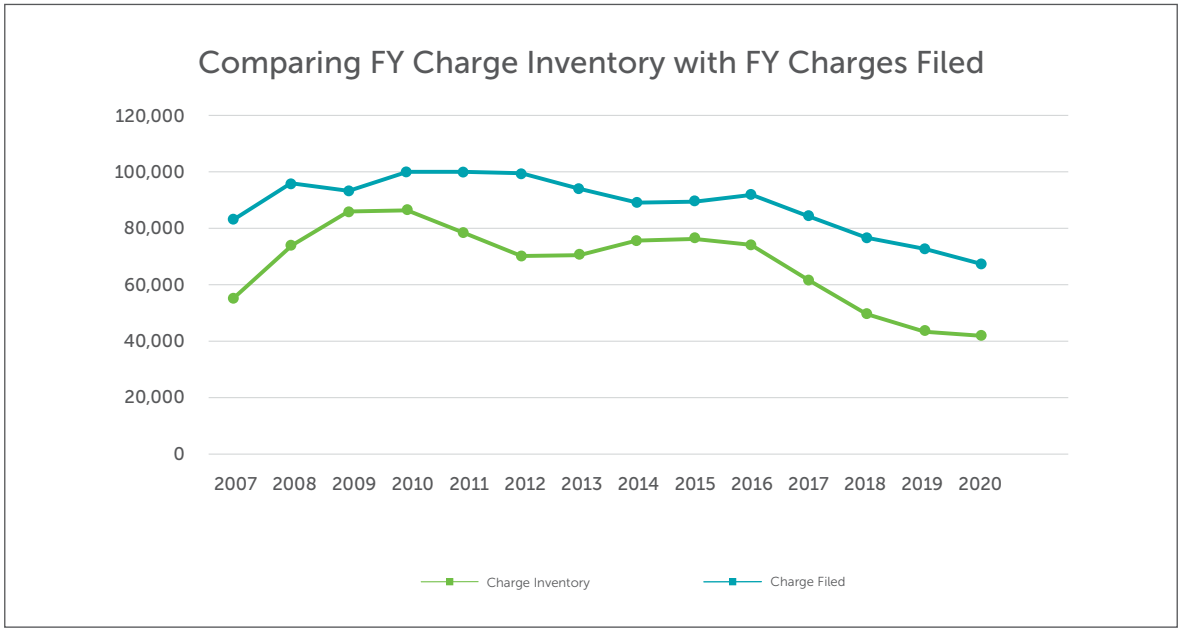
In addition, the EEOC indicates the merit factor rate of these charges increased from 15.6% to 17.4% from FY 2019 to FY 2020.[119] The agency further highlighted the percentage of post-investigation charge resolutions in which the EEOC was able to obtain some form of targeted, equitable relief.[120] Out of a total of 1,061 resolutions, 93.3% or 990 of those resolutions included targeted, equitable relief.[121] With the EEOC's target for the upcoming fiscal year remaining at 84-86% of resolutions containing targeted, equitable relief, it can be expected that the agency will continue to push for such relief for any charges where the EEOC finds merit and seeks a resolution. Relatedly, Fair Employment Practices Agencies (FEPA) reported 5,103 merit resolutions, but in contrast to the EEOC, only 20.7% or 1,055 of those resolutions involved targeted, equitable relief.[122]

During FY 2020, the agency secured over $535.4 million for victims of discrimination in the private sector and local governments, $333.2 million of which was obtained through mediation, conciliation, and settlements, and $106 million through litigation, which the EEOC notes is the highest amount in 16 years.[123] By comparison, in FY 2019, the EEOC secured a total of $486 million in monetary recovery, $346.6 of which was obtained through mediation, conciliation, and settlements, and $39.1 million through litigation.[124]

116 EEOC, Fiscal Year 2020 Agency Financial Report, *available at* https://www.eeoc.gov/sites/default/files/2020-11/2020-AFR.pdf.
117 EEOC, Fiscal Year 2020 Annual Performance Report, *available at* https://www.eeoc.gov/fiscal-year-2020-annual-performance-report.
118 FY 2020 AFR, p. 19.
119 *Id.*, p. 18. The EEOC has defined "Merit Resolutions" as charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm.
120 FY 2020 APR, p. 15. Targeted, equitable relief is defined as "any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case and either provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate." *Id.*
121 *Id.*
122 *Id.*
123 FY 2020 AFR, p. 10. The remaining monetary recovery was obtained on behalf of federal employees and applicants.
124 EEOC, Fiscal Year 2019 Annual Performance Report, *available at* https://www.eeoc.gov/fiscal-year-2019-annual-performance-report.

With respect to the backlog of charges, in the FY 2020 AFR, former Chair Janet Dhillon touted the Commission's reduction of the inventory of pending private-sector charges by 3.7% (to 41,951 charges), "the lowest in 14 years."[125] This is the fifth year in a row that the charge inventory has decreased.

Fiscal Year	Charge Inventory	% Increase/Decrease
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%
2016	73,559	-3.73%
2017	61,621	-16.23%
2018	49,607	-19.50%
2019	43,580	-12.15%
2020	41,951	-3.74%



The Commission credits "a focus on inventory reduction strategies and priority charge handling procedures, technological enhancements, and front-line staff hired in fiscal years 2018 through 2020" with its progress on reducing the backlog of charges.[126]

The priority charge handling procedures included pre-charge counseling and pre-determination interviews. "Effective pre-charge counseling ensures that individuals make informed decisions about whether to file a charge of discrimination and the pre-determination interview allows the EEOC to communicate the basis for our decisions to the parties. Both are essential for good customer service and effective charge processing."[127]

125 FY 2020 AFR, p. 10.
126 *Id.*, p. 19.
127 *Id.*

As noted, technological advances also played a role in reducing charge inventory, according to the Commission. Specifically, the Commission credits its Public Portal, Respondent Portal, and its overall Digital Charge System (DCS) with helping to reduce pending charges. The FY 2020 AFR explains:

> The DCS allows potential charging parties to answer a series of questions leading to a self-screen (to determine if the EEOC is the proper agency to address their concern), as well as obtain referrals to other agencies, as appropriate, and to allow them to schedule an initial interview prior to filing a charge. The DCS provides an accessible and customer-friendly approach and reflects the value of providing greater access for the public to speak with a member of our enforcement staff prior to filing a charge of discrimination.[128]

According to the FY 2020 AFR, as a result of these new technologies, "122,775 Potential Charging Parties (PCPs) initiated inquiries through the system. Of these portal inquiries, 30,294 were formalized into charges of discrimination (very similar to the 30,759 portal inquiries in fiscal year 2019)."[129]

The use of re-charge counseling and the elimination of a paper intake questionnaire resulted in the 7.2% reduction in charge receipts for FY 2020. In addition, the FY 2020 AFR indicates there was a 6.7% reduction in the number of inquiries filed, 13,388 less than in FY 2019.[130]

With respect to staffing, the EEOC had 1,939 FTEs at the end of FY 2020, representing an almost 6% decrease in staff.[131]

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/Decrease	Percentage Increase/Decrease
2007	2,158	---	---
2008	2,176	18	0.83%
2009	2,192	16	0.74%
2010	2,385	193	8.80%
2011	2,505	120	5.03%
2012	2,346	-159	-6.35%
2013	2,147	-199	-8.48%
2014	2,098	-49	-2.28%
2015	2,191	93	4.43%
2016	2,202	11	0.50%
2017	2,082	-120	-5.45%
2018	1,968	-114	-5.48%
2019	2,061	93	4.73%
2020	1,939	-122	-5.92%

In summary, it appears that the COVID-19 pandemic has had some effect on the agency. The overall number of charges filed in FY 2020 was at its lowest, which could be seen as a reason for the EEOC's ability to address its charge backlog. The Office of Enterprise Data and Analytics is currently conducting a research study to determine "whether there may be a correlation or causal relationship between unemployment during economic downturns and EEOC charge filings, and how EEOC charge filings may be affected by the economic downturn related to COVID-19."[132] The EEOC has not stated when the results from that study are expected to be released.

B. Systemic Investigations and Litigation

Although most EEOC lawsuits were filed on behalf of individual charging parties, the Commission has continued to demonstrate interest in initiating systemic investigations and litigation. Discrimination is considered "systemic" if it involves a discriminatory pattern, practice or policy that has a broad impact on an industry, company or geographic area. One of the

128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*, p. 37.
132 FY 2020 APR, p. 57.

EEOC's Strategic Objectives is to "combat and prevent employment discrimination through the strategic application of the EEOC's law enforcement authorities."[133] In FY 2020, however, the EEOC filed fewer lawsuits in general, and systemic lawsuits in particular, although this likely had more to do with the pandemic than a shift in priorities.

Specifically, in FY 2020, the Commission filed 93 merits lawsuits, down considerably from the 144 merits lawsuits filed in FY 2019.[134] Of those lawsuits, 13 (14%) were systemic suits involving multiple victims or discriminatory policies. The year before, of the EEOC's 144 merits lawsuits, 17, or 11.8%, involved allegations of systemic discrimination.

Year	Merits Case Filings	Systemic Filings	Percentage
2009	281	19	6.8%
2010	250	20	8%
2011	261	23	8.8%
2012	122	10	8.2%
2013	131	21	16%
2014	133	17	12.8%
2015	142	16	11.3%
2016	86	18	20.9%
2017	184	30	16.3%
2018	199	37	18.6%
2019	144	17	11.8%
2020	93	13	14%

Moreover, within its 2018-2022 Strategic Plan, the Commission states under "Strategic Objective I" (combat employment discrimination through strategic law enforcement) that one of the Commission's four key strategies includes "us[ing] administrative means and litigation to identify and attack discriminatory policies and other instances of systemic discrimination."[135] Unlike its prior Strategic Plan, wherein the Commission stated its goal that 22-24% of the cases in the Commission's litigation docket must be systemic cases, the 2018-2022 Strategic Plan does not outline any specific performance target for FY 2020. It is likely, however, that the Commission will continue to pursue its systemic initiative. In fact, on January 8, 2021, the EEOC launched a new webpage dedicated to systemic enforcement.[136] The stated purpose of the page is "to provide transparency about how the Commission approaches systemic discrimination enforcement efforts."[137] The page describes how the EEOC "determined that systemic enforcement is effective, explains how the EEOC determines what is systemic discrimination, and details the process of initiating and conducting a systemic case."[138]

Fiscal Year	Systemic Lawsuits Filed	Monetary Recovery
2012	12	$36.2 million
2013	21	$40 million
2014	17	$13 million
2015	16	$33.5 million
2016	18	$20.5 million
2017	30	$38.4 million
2018	37	$30 million
2019	17	$22.8 million
2020	13	$69.9 million

133 EEOC FY 2020 AFR, p. 14.
134 FY 2020 AFR, p. 11.
135 EEOC, Strategic Plan for Fiscal Years 2018-2022, *available at* https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm#objective1 (last visited Feb. 6, 2020).
136 EEOC, Press Release, *EEOC Unveils New Webpage Concerning Systemic Enforcement* (Jan. 8, 2021). The page can be found here: *https://www.eeoc.gov/systemic-enforcement-eeoc*.
137 *Id.*
138 *Id.*

The overall percent of pending systemic cases saw an increase percentage-wise, but the total number of systemic cases on the EEOC's active court docket remained the same as 2019.[139] These systemic suits involved the following types of alleged systemic discrimination: ADA policy claims; hiring claims based on race and sex; systemic harassment based on race, national origin, and sex; equal pay claims; and pregnancy accommodation claims.[140]

Fiscal Year	Number of Total Pending Litigation Cases	Number of Systemic Cases	% of Systemic Cases in Litigation
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%
2020	201	59	29.3%

C. EEOC Litigation Statistics and Increased Focus on Workplace Harassment

As noted, in FY 2020, the EEOC filed 93 "merits" lawsuits, which included 68 suits filed on behalf of individuals, and 25 "multiple victim" lawsuits, which involved 12 non-systemic class suits (typically involving fewer than 20 individuals) and 13 systemic suits.[141]

Year	Individual Cases	"Multiple Victim" Cases (including systemic cases)	Percentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits" Lawsuits[142]
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	68	25	27%	93

In past years, the EEOC filed a large number of lawsuits in the last two months of the fiscal year. FY 2020 was a year unlike any other, however, so it comes as no surprise that the typical end-of-year filing surge was more of a trickle. Between

139 FY 2020 APR, p. 46. It should be noted that there is a discrepancy with number of active systemic cases that were reported in the EEOC's APR. On page 46, the EEOC contends that there are currently 59 systemic cases on its active docket. The next page of the APR, page 47, the agency reported that 41 of its cases on its active docket are systemic cases.

140 *Id.* at p. 47.

141 EEOC FY 2020 AFR, p. 11.

142 *See Id.* The EEOC has defined "merits" suits as direct lawsuits or interventions involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

August 1 and September 30, the EEOC filed a mere 38 lawsuits in federal district courts, or around 40% of the total. The prior fiscal year the EEOC filed 71 lawsuits on or after August 1, constituting nearly half of the total lawsuits filed the entire fiscal year. In FY 2018, 60% of the EEOC's lawsuits were filed on or after August 1, 2018.

The top 14 states for EEOC lawsuits filed over the past fiscal year are as follows:[143]

State	Number of Lawsuits
Texas	11
Florida	9
California	8
New York	7
Georgia	6
Michigan	6
Arkansas	5
Maryland	5
Ohio	4

At the end of fiscal year 2020, the EEOC had 201 cases on its active district court docket, of which 31 (15.4%) were non-systemic multiple victim cases and 59 (29.3%) involved challenges to systemic discrimination.[144] Meanwhile, the EEOC had resolved 165 merits lawsuits at the federal district court level, and as a result, recovered approximately $106 million on behalf of 25,925 individuals.[145] The EEOC reports that it achieved "a favorable result in approximately 96 percent of all district court resolutions."[146]

Looking at the bases or types of claims asserted in the 93 "merits" lawsuits filed in FY 2020, 59 lawsuits implicated Title VII claims (*i.e.*, race, sex, religion, and national origin), 29 contained ADA claims, 7 contained ADEA claims, and 26 filings included retaliation claims.[147]

143 Littler monitored the EEOC's court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not currently make publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis.

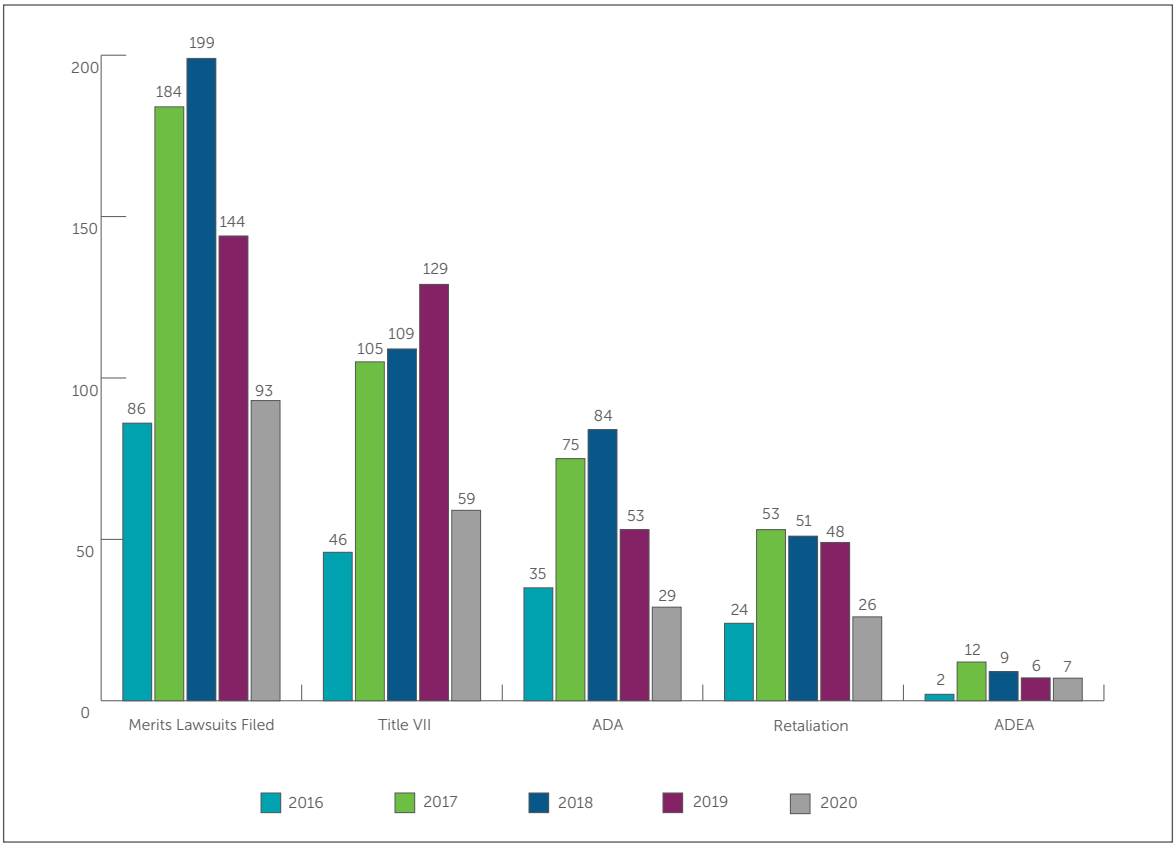
144 FY 2020 APR, p 46

145 *Id.*

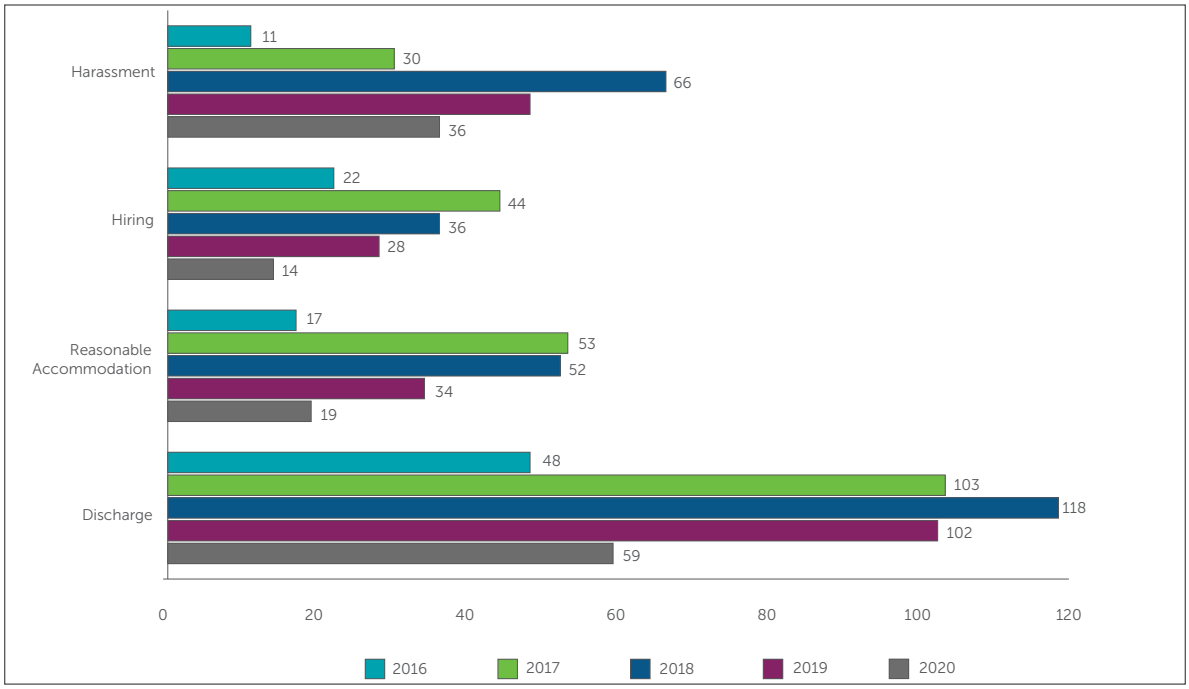
146 *Id.*

147 *Id.*

The following chart shows a year-over-year comparison for the last five years (FY 2016-2020) for the aforementioned bases of the lawsuits filed by the EEOC.



For the past five years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[148] The chart below demonstrates the variance by issue for each fiscal year.



148 FY 2020 APR, p. 46.

More recently, the EEOC has made combatting workplace harassment a "top priority," especially in light of the #MeToo movement.[149] In 2015, the EEOC created the Select Task Force on the Study of Harassment in the Workplace and a Co-Chairs' Report was issued in 2016 summarizing its findings.[150] Based on the increased public attention and the EEOC's Study, the Commission has ramped up its efforts on both the training and enforcement fronts.[151]

The EEOC last report it received 7,514 charges alleging sexual harassment in FY 2019, representing 10.3% of all charges, a slight (1.2%) decrease over the prior year. The total number of sexual harassment charges decreased again in FY 2020, with 6,587 charges filed over the course of the fiscal year.[152]

Of the 93 merits lawsuits filed by the EEOC in FY 2020, 33 (36%) raised claims of harassment.[153] Twenty-four of those lawsuits specifically involve claims of sexual harassment. There were race harassment claims and one national origin harassment claim.[154] Twelve harassment lawsuits were class cases and one was considered to be a systemic harassment case.[155] According to the FY 2020 APR, the EEOC successfully resolved 62 harassment lawsuits over this period, seven of which involved allegations of systemic harassment.[156] Through its litigation efforts, the EEOC recovered approximately $84.4 million for 902 victims of harassment.[157]

D. Mediation Efforts

In its FY 2020 AFR, the EEOC notes that it achieved 6,272 successful mediations in resolving charges out of 9,036 mediations conducted.[158] Moreover, the Commission secured $156.6 million in monetary benefits for complainants through its mediation program.[159] In addition, the EEOC reports that during fiscal year 2020, the employer participation rate in mediation was 31.7%, a 3.3% increase over the prior year.[160]

The EEOC attributed some of its success with its mediation program to its increased outreach efforts via marketing campaigns. According to the Commission, EEOC field offices conducted a total of 267 ADR employer events.[161]

E. Significant EEOC Settlements and Monetary Recovery

As noted, the EEOC secured approximately $333.2 million for parties in private sector and state and local government workplaces through mediation, conciliation, and settlements. Although EEOC case filings and decisions fell over the past fiscal year, high-dollar settlements increased in FY 2020 over the prior year. At least 22 consent decrees and reported conciliation agreements resulted in payments of $500,000 or more per agreement, up from 19 in FY 2019. Of those settlements, at least 14 required employers to pay over $1 million, versus eight the prior fiscal year. Two of these settlements were in the $20 million range.

As in prior years, allegations of disability discrimination were the most common claim underlying these high-dollar settlements. This year, nine major settlements invoked claims under the ADA. At least six settlements alleged race discrimination. The remaining settlements raised claims of sex discrimination, sex and race harassment, age and national origin discrimination, and retaliation in relatively equal numbers.

Although the allegations in these settlements necessarily vary, a common element is that in most, the EEOC alleges the employer engaged in systemic discrimination against several employees, often on a nationwide basis. In addition to providing monetary relief, employers in these settlements frequently agree to hire outside EEO consultants and/or assign internal personnel to monitor compliance with anti-discrimination laws in general, and the terms of the settlement in particular. In most, if not all, of these agreements, the employer also promised to provide a certain amount of anti-discrimination training to employees.

149 FY 2018 PAR, pp. 31, 35.
150 *Id.* p. 31.
151 *Id.*
152 EEOC Charge Statistics, FY 1997 through FY 2020, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
153 FY 2020 APR, p. 47.
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.*
158 FY 2020 AFR, p. 23.
159 *Id.*
160 *Id.* p. 25.
161 *Id.*

In FY 2020, the Commission launched a six-month conciliation pilot program "to drive greater internal accountability and improve the EEOC's implementation of existing practices."[162] According to the Commission, given this priority, the EEOC's success rate with conciliations rose from 40% in FY 2019 to 43.6% in fiscal year 2020.[163] Moreover, the EEOC reported that its success rate for conciliation of systemic charges was 64% in fiscal year 2020, up from 56% in FY 2019, and 46% for FY 2018.[164]

In one case that settled for $20.5 million in FY 2020, the EEOC alleged an insurance company discriminated against female and Black employees by paying them less, passing them over for promotion, and by tolerating harassing behavior. Under the terms of the four-year consent decree, in addition to the payment to the 21 affected former employees, the company agreed to designate an employee as an Internal Compliance Monitor and retain an outside consultant to review its EEO policies, promotion and compensation practices and data, and future complaints of discrimination, harassment, and retaliation. The company also agreed to provide training on discrimination, harassment, and retaliation, and to rate its managers and supervisors on their compliance with the company's EEO policies and laws prohibiting discrimination and retaliation.

In another high-dollar settlement ($10 million), the EEOC claimed the defendant systematically laid off employees over the age of 40 and filled those positions with younger employees. The complaint also alleges older workers were passed over for rehire in favor of less-qualified, younger candidates. The three-year consent decree requires the company to retain an EEO monitor, a diversity director, and a layoff coordinator to monitor compliance with the ADEA and the decree. The company will also provide training on age discrimination, and will report to the EEOC on its recruiting efforts, hiring, layoffs, terminations, and discrimination complaints.

In a separate, decade-long age discrimination matter, a county employer agreed to settle allegations it engaged in age discrimination by forcing employees hired at older ages to pay more in pension benefits. In 1999 and 2000, two county correctional officers, ages 51 and 64, respectively, filed charges of discrimination with the EEOC alleging that the county's plan and disparate contribution rates discriminated against them based on their ages. Under the county's defined benefit pension plan, employee contribution rates were based on age at entry into the retirement system, with older employees paying higher rates than younger members for the same benefits.

In 2012, the district court granted partial summary judgment for the EEOC, ruling that the county's pension plan was facially discriminatory and not justified by financial considerations, thus violating the ADEA.[165] In 2014, the Fourth Circuit affirmed and remanded for further proceedings to address the issue of damages.[166] In 2016, the parties resolved the EEOC's claims for injunctive relief through a joint order under which the county eliminated age-based contribution rates. In 2016, the district court determined that no monetary relief was appropriate.[167] In 2018, the Fourth Circuit reversed and remanded, however, holding that "a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability."[168] Finally, in October 2019, the district court ordered that the EEOC could recover back pay accruing between March 2006 and April 2016, for eligible class members.[169] To that end, under the consent order resolving this lawsuit, the county agreed to pay approximately $5.4 million to more than 2,000 retirees.

Appendix B of this Report includes a description of these and other notable consent decrees and conciliation agreements averaging $500,000 or more, as well as significant judgments and jury verdicts.

F. Appellate Cases

In recent years, the EEOC has filed fewer notices of appeal in federal circuit courts of appeals, but continues to actively participate as amicus curiae in private lawsuits. During FY 2020, the EEOC filed four new appeals in federal court, and briefs as *amicus curiae* in 16 appellate cases.[170] According to the FY 2020 APR, the EEOC secured over $12.2 million in monetary relief ordered in EEOC federal appellate decisions.[171] Discussion of the recent Supreme Court case finding sexual orientation and gender identity included within the protected classification of "sex" under Title VII and two other notable appellate wins are discussed below.

162 EEOC FY 2020 AFR, p. 24.
163 EEOC FY 2020 AFR, p. 25; EEOC FY 2019 AFR, p. 23.
164 *Id.*; *see also* EEOC FY 2019 AFR, p. 23.
165 *EEOC v. Balt. Cnty.*, 2012 WL 5077631 (D. Md. Oct. 17, 2012).
166 *EEOC v. Balt. Cnty.*, 747 F.2d 267 (4th Cir. 2014).
167 *EEOC v. Balt. Cnty.*, 202 F. Supp. 3d 499 (D. Md. 2016).
168 *EEOC v. Balt. Cnty.*, 904 F.3d 330, 333 (4th Cir. 2018).
169 *EEOC v. Balt. Cnty.*, No. RDB-07-2500 (D. Md. Oct. 28, 2019).
170 EEOC appellate and amicus briefs can be searched on the EEOC's webpage, *available at* https://www1.eeoc.gov/eeoc/litigation/briefs.cfm.
171 FY 2020 APR, p. 31.

1. U.S. Supreme Court Recognizes Sexual Orientation and Gender Identity as a Protected Classification Under Title VII

On June 15, 2020, the Supreme Court held that sex discrimination under Title VII includes sexual orientation and gender identity, addressing an issue of first impression in a trio of cases.[172] In a 6 to 3 ruling, the High Court reasoned, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The Court explained, "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." Accordingly, the Court concluded, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[173]

In reaching this conclusion, the Court rejected the argument that "sex" is limited to the biological distinctions between men and women. Looking to the text of Title VII, the Court reasoned that the statute prohibits employers from discriminating against the individual "because of sex," which encompasses actions taken by employers against employees who display attributes that it would tolerate if they were exhibited by an individual of the other sex. The Court explained that Title VII is written in "starkly broad terms" and, as a result, this "elephant has never hidden in a mousehole; it has been standing before us all along."[174]

The EEOC did not file an *amicus* brief in the *Bostock* case, but was a party in one of the two companion cases, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, where the EEOC reversed its own position on whether sex discrimination includes sexual orientation and gender identity. Beginning around 2011, the EEOC's view on "sex" had grown more expansive.[175] In 2014, the EEOC sued a funeral home claiming an employee's job termination for being transgender violated Title VII.[176] The Supreme Court granted review. After an intervening change in the EEOC's political composition and the appointment of Attorney General Eric Holder, however, the EEOC submitted a brief to the Supreme Court arguing that sex referred to unequal treatment of men and women in the workplace. Further, the EEOC argued defining "sex" to include gender identity would be inconsistent with the ordinary, public meaning of "sex" as "biological sex" when Title VII was enacted, the opposite of its position before the lower courts in the same case.

2. Notable Wins for the EEOC

In *EEOC v. Vantage Energy Services, Inc.*, the Fifth Circuit reversed the district court's one-sentence dismissal of the EEOC's Americans with Disabilities Act discrimination complaint for untimeliness, holding an employee's letter and intake questionnaire satisfied the 300-day deadline to file a charge with the EEOC.[177] Even though the intake questionnaire was not technically a "charge," the substance of the letter and questionnaire fulfilled all but one of the minimum statutory requirements, including identification of the persons involved, the action or practice complained of, and a request to the EEOC to act on the employee's behalf. In finding the questionnaire can be deemed a charge if it fulfills the minimum statutory charging document requirements, the court followed the Supreme Court's decision *Federal Express Corp. v. Holowecki*,[178] even though that case construed the Age Discrimination in Employment Act, not the ADA, stating, "Nonetheless, every circuit (including this one) to have considered whether *Holowecki's* holding extends to Title VII and the ADA has determined that it does."[179]

The court further held that, although the questionnaire was not formally verified until two months after it was submitted, the verification could be related back to the date of the initial questionnaire under the rules that: (1) charges may be amended to cure technical defects (including lack of verification) and (2) the verification criteria is satisfied so long as the verification occurs prior to the due date for the employer's response.[180] The court rejected the employer's due process argument, observing that the employer had not been prejudiced.[181] Although Vantage Energy Services asked the Supreme Court to review the Fifth Circuit's decision, the Court denied the petition for certiorari on January 11, 2021.[182]

172 *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).
173 140 S.Ct. at 1758, citations omitted.
174 140 S.Ct. at 1753.
175 140 S.Ct. at 1757, n.7 (EEOC first advanced a position that discrimination against a transgender individual violates Title VII in 2011).
176 *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F.Supp.3d 594 (E.D. Mich. 2015).
177 *EEOC v. Vantage Energy Servs., Inc.*, 954 F.3d 749 (5th Cir. 2020).
178 552 US 389, 402 (2008).
179 *Vantage Energy Servs., Inc.*, 954 F.3d at 754.
180 *Id.* at 756.
181 *Id.* at 757.
182 *Vantage Energy Servs., Inc. v. EEOC*, 954 F.3d 749 (5th Cir. 2020), *petition for cert. filed* (U.S. July 2, 2020) (No. 19-1476); *cert. denied* (U.S. Jan. 11, 2021).

3. Notable Wins for Employers

In the most recent decision in the long-running *EEOC v. CRST Van Expedited, Inc.*, a sexual harassment lawsuit on behalf of over 250 female long-haul drivers, a three-judge panel of the Eighth Circuit affirmed an award of $3.3 million in attorneys' fees to the employer.[183] The EEOC appealed the award, claiming the employer had not sustained its burden to prove the EEOC's approximately 70 claims dismissed in summary judgment proceedings were "frivolous, unreasonable and/or groundless" under *Christiansburg Garment Co. v. EEOC*[184] or that the attorneys' fees awarded were incurred for the purposes of defending against such claims.[185] According to the panel, "[t]he district court's finding that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims is consistent with this court's prior observation that the EEOC 'wholly failed to satisfy its statutory presuit obligations.' The EEOC could not hold a reasonable belief that it satisfied its presuit obligations when it 'wholly failed to satisfy' them."[186] The court rejected the EEOC's second main argument that the award amount was inflated because the employer had not proved the fees were incurred "solely" to defend against frivolous claims. Instead, the district court must determine whether the fees would have been incurred in the absence of the frivolous allegations and its order will be affirmed if it accomplishes "rough justice."[187]

The court also made an interesting finding that could be useful to employers defending against class-type claims brought by the EEOC. Section 707 specifically authorizes pattern-or-practice claims on behalf of a group of persons but does not offer the full panoply of remedies offered by section 706.[188] The EEOC thus often pursues pattern-or-practice claims under section 706 without alleging section 707. The few appellate courts to address this tactic have ruled in favor of the EEOC.[189] However, in *CRST Van Expedited*, the court approved the district court's reasoning that the EEOC's claims were frivolous, unreasonable, and/or groundless because the EEOC had failed to properly allege a pattern-or-practice theory under section 707 but "then proceed[ed] to premise the theory of its case on such a claim."[190]

For additional information regarding appellate cases in which the EEOC filed an appellate or an amicus brief, see Appendix C to this Report.

183 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750, 760 (8th Cir. 2019).
184 434 U.S. 412 (1978).
185 *Id.* at 757-758.
186 *Id.* at 757.
187 *Id.* at 758.
188 Compare 42 U.S.C.A. § 2000e-6 (section 707) with 42 U.S.C.A. § 2000e-5 (section 706).
189 See, *e.g.*, *EEOC Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016) and *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2013).
190 *Id.*

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

With the change in administration came change in leadership at the Equal Employment Opportunity Commission. On January 21, 2021, President Biden designated Commissioner Charlotte A. Burrows (D) as chair of the agency, and Commissioner Jocelyn Samuels (D) as vice chair. While a nomination to serve on the Commission must be confirmed by the Senate, the president may unilaterally designate which commissioners serve as chair and vice chair.

At the outset, it is critical to note that while the Commission is now chaired by a Democratic member, the majority of the five-member agency is Republican, and may remain so for quite some time. Absent any departures, the makeup of the Commission is currently:

- Chair Charlotte A. Burrows (D), whose term expires on July 1, 2023
- Vice Chair Jocelyn Samuels (D), whose term expires on July 1, 2021
- Commissioner Janet Dhillon (R), whose term expires on July 1, 2022
- Commissioner Keith Sonderling (R), whose term expires on July 1, 2024
- Commissioner Andrea Lucas (R), whose term expires on July 1, 2025[191]

The Commission's general counsel, Sharon Fast Gustafson (R), was appointed by President Trump for a four-year term that expires in August 2023.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters (the agency has held a number of telephonic public meetings throughout the course of the COVID-19 pandemic).

That said, with Burrows and Samuels in the minority, the ability of the Commission to move forward on significant policy matters that do not enjoy bipartisan support, issue new guidance or regulations, or revisit policies and priorities of the prior administration may be limited, at least for some time.

In the final months of the Trump administration, the Commission acted on a number of items, ranging from regulations to policy guidance to its own internal litigation procedures, many of which were adopted along party lines.

B. Regulations and Policy Guidance

1. Limited Delegation of Litigation Authority

In 1995, the Commission adopted rules broadly delegating the authority to bring litigation in federal court without Commission approval to the general counsel. In recent years, the Commission has taken steps to gradually pull back some of that delegated authority, meaning that more cases must be approved by the full Commission before they are filed. Most recently, on January 15, 2021, the Commission voted along party lines to limit dramatically the general counsel's authority to file suit without the approval of the Commission. The delegation of authority now provides that the full Commission must vote to approve all:

- cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;

191 Due to certain "holdover" provisions within Title VII, a commissioner whose term has expired may continue to serve in holdover status under certain circumstances, potentially until the start of the next session of Congress in the January following the end of their term.

- cases presenting issues on which the general counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;
- other cases reasonably believed to be appropriate for Commission approval in the judgment of the general counsel, including but not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and
- all recommendations in favor of Commission participation as *amicus curiae*.

Perhaps more notable, even where cases do not fall within the above criteria, the revised delegation provides that before filing *any* case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means, as a practical matter, that any bloc of three commissioners can effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit).

2. Revised Procedures for Conciliation

In January 2021, the agency published its final regulations updating its conciliation procedures.[192] By way of background, "conciliation" refers to the statutory requirement that, after the EEOC has found reasonable cause to believe discrimination occurs, the agency must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" prior to filing suit.[193] In 2015, the U.S. Supreme Court held that the question of whether the agency had fulfilled its statutory duty to conciliate was subject to judicial review, but that the standard for review would be highly deferential to the agency.[194] The new regulations seek to bring additional transparency and consistency to the agency's conciliation processes, and in general require that in all conciliations, the Commission will (if it has not already done so):

- Provide the respondent with a written summary of the known facts and non-privileged information that form the basis of the allegation(s), including identifying known aggrieved individuals or known groups of aggrieved individuals, for whom relief is being sought. Where the Commission anticipates using a claims process to identify aggrieved individuals, it must identify the criteria that will be used to identify victims from the pool of potential class members;
- Provide the respondent with a written summary of the legal basis for the allegation(s). the Commission may, but is not required, to provide a response to the defenses raised by respondent;
- Provide a written basis for any monetary or other relief including the calculations underlying the initial conciliation proposal, and an explanation thereof (a written explanation is not required for subsequent offers and counteroffers);
- Advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice, if the designation has been made at the time of the conciliation, and the basis for the designation; and
- Provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal.

Under the final regulations, any information the Commission provides to an employer, except for information about another charging party or aggrieved individual, will also be provided to the charging party, upon request. During consideration of the regulations, Commission Democrats argued that they were unnecessary, unduly restrictive in limiting how the Commission is permitted to conduct conciliation, and insufficiently supported by the factual record. We anticipate an effort to revisit these regulations in the future.

3. Opinion Letters

In April 2020, the Commission approved its first formal opinion letter in over three decades, relating to employers' ability to make certain inquiries to workers with disabilities, where the employer seeks to obtain a tax credit for hiring underrepresented workers.[195] This was followed by an opinion letter in September 2020, relating to the Commission's authority to engage in litigation under Section 707(a) of Title VII, which allows the Commission to bring so-called "pattern or practice" suits against

192 EEOC, *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).
193 42 U.S.C. § 2000e-5(b) – Enforcement Provisions.
194 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
195 EEOC, *Commission Opinion Letter: Federal Work Opportunity Tax Credit Form 8850* (Apr. 29, 2020).

employers.[196] In its September letter, the Commission clarified that a Section 707 suit must be based on an allegation of unlawful discrimination in violation of Title VII's prohibition on unlawful discrimination and/or unlawful retaliation. The Commission made clear that Section 707 does not provide a "freestanding" violation of Title VII (sometimes called "resistance" claims). The Commission further clarified that pattern-or-practice suits under Section 707 are subject to the same pre-suit requirements as claims brought under Section 706 (including a charge, a reasonable cause finding, and an attempt to conciliate the dispute in accordance with the statute).

Formal opinion letters set forth the EEOC's official permission on a matter, and may be relied upon as a defense to liability under Title VII or the Age Discrimination in Employment Act (no such defense is available under the Americans with Disabilities Act, Equal Pay Act, or Genetic Information Nondiscrimination Act). In December 2020, the agency rolled out a new process for the public to request formal opinion letters under the ADEA or Title VII. Two such letters were issued in January 2021, including one relating to Individual Coverage Health Reimbursement Arrangements under the ADEA,[197] and a second relating to the information an employer may provide to obtain a lawful waiver under the Older Workers Benefit Protection Act (which amended the ADEA).[198]

During debate in April 2020, when the Commission was proposing to issue its first opinion letter in 30 years, then-Commissioner Burrows voiced her concerns with the opinion letter process, and that it could impose a heavy burden on the Commission to respond to numerous requests. Given now-Chair Burrows' general lack of enthusiasm for opinion letters, it seems likely that we will see few if any new opinion letters from the agency in the near future.

4. Religious Discrimination

The rights of religious employees had been a focus of the EEOC under the prior administration. The general counsel held a series of "dialogue sessions" with religious leaders, advocacy groups, and faith-based non-profits to discuss methods on how the agency might improve its enforcement of Title VII's prohibition on religious discrimination (it is unclear whether any representatives of employers or the management bar were included in these discussion sessions). Separately, shortly before the change of administrations, the agency voted to finalize revisions to its compliance manual section on religious discrimination.[199] While such guidance does not have the force of law, it does offer insight into how the Commission views unsettled areas of the law, and how it is inclined to enforce the statute. The revised compliance manual also includes a number of examples, and recommended "best practices" for employers relating to harassment on the basis of religion, requests for accommodation of religious beliefs, and the like. The revised compliance manual was approved on a 3-2 party line vote, and remains the stated position of the Commission on these issues until modified or withdrawn.

5. COVID-19 Guidance

As discussed in Part I of this Report, the EEOC has, throughout the pandemic, maintained updated guidance as to employers' and employees' rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.[200] Most recently, the agency updated its FAQs regarding vaccinations, making clear that an employer merely asking for proof of vaccination is not a "medical examination" and does not implicate ADA concerns. Employers should be aware however, that asking why an employee is not vaccinated (or engaging in pre-vaccination questions where the employer or a third party with whom it contracts is vaccinating workers) likely do implicate the ADA insofar as they are questions that are likely to elicit information about a disability. Moreover, employees who are unable to get vaccinated due to a disability, or who have religious objections to taking the vaccine, may also be entitled to "reasonable accommodation" where that does not impose an undue hardship on the employer.

196 EEOC, *Commission Opinion Letter: Section 707* (Sept. 3, 2020).
197 EEOC, *Commission Opinion Letter: Individual Coverage Health Reimbursement Arrangements (ICHRA) under the ADEA* (Jan. 7, 2021).
198 EEOC, *Commission Opinion Letter: Older Worker Benefit Protection Act* (Jan. 14, 2021); *see also* Emily Shoda and Kerry Notestine, *EEOC Issues Guidance on Inclusion of International Employees on OWBPA Disclosures*, Littler ASAP (Jan. 15, 2021).
199 EEOC, CVG-2021-3, *Section 12: Religious Discrimination* (Jan. 15, 2021).
200 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Dec. 16, 2020).

We expect that the agency will continue to update this guidance, and employers contemplating mandatory vaccination as a condition of returning to work, or incentivizing employees to get vaccinated, should consult with counsel to ensure they are compliant with state and federal non-discrimination laws.

C. New Agency Priorities

Upon attaining a Democratic majority, it is likely that the Commission will revisit some of the above matters, potentially limiting or repealing them entirely. The agency will also then be able to begin advancing new initiatives. A number of issues seem ripe for consideration in a Democratically-controlled EEOC.

1. Compensation Data

During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful, and ordered the agency to collect two years of pay data). A National Academy of Sciences panel was recently formed to evaluate the compensation data collected by the EEOC to determine its utility, and potentially make recommendations regarding future data collection. We predict it is likely that EEOC will attempt again to require employers to submit employee compensation data to the agency; whether the collection mirrors what was previously done, or adopts a different approach, remains to be seen. The EEOC suspended collection of all EEO-1 data last spring,[201] but is scheduled to resume collection of data (including calendar year 2019 and 2020) in the late spring of 2021.

2. Wellness Regulations

In January 2021, the Commission unveiled proposed regulations[202] regarding permissible incentives for workplace wellness plans under the Americans with Disabilities Act and Genetic Information Non-Discrimination Act (the rules were previously approved by the Commission, and under review by the Office of Management and Budget until early this year). The proposed regulations set forth the circumstances under which employers could incentivize (or potentially penalize) employee participation in workplace wellness plans that include medical examinations or disability-related inquiries, and set limitations on the size of incentives employers could offer, depending upon the nature of the plan. The January regulations were not published in the *Federal Register* prior to the change of administration, and the incoming Biden administration directed agencies to withdraw regulations that had not yet been published.[203] The EEOC did so, and it does not appear that the Commission will move forward on these proposed rules in the form previously approved (notably, then-Commissioner Burrows voted against advancing the ADA rule when it was first considered by the Commission in June 2020). It appears more likely that the Commission will revisit the issue and propose rules that Commission Democrats will support.

3. Artificial Intelligence, Big Data, and Non-Discrimination

The increased use of artificial intelligence and "big data" in employment decisions had started prior to the COVID-19 pandemic. Many predict, however, that the pandemic will serve only to speed that trend. Increasingly, we have seen discussion of what the civil rights and non-discrimination implications of this increased use of data and technology may be. The EEOC last examined the use of "big data" in employment in an October 2016 public meeting.[204] More recently, in February 2020, the U.S. Congress, the U.S. House Education and Labor Committee's Subcommittee on Civil Rights and Human Services held a hearing to explore these issues, including testimony from former Obama administration EEOC Chair Jenny Yang.[205] We expect this to continue to be an increasingly important issue, and one that is likely to generate keen EEOC interest going forward.

201 *See* Jim Paretti and David Goldstein, *EEOC Will Not Collect EEO-1 Data This Year*, Littler ASAP (May 7, 2020).
202 EEOC, Press Release, *EEOC Provides Proposed Wellness Rules for Review* (Jan. 7, 2021).
203 Executive Order 13992 of January 20, 2021, *Revocation of Certain Executive Orders Concerning Federal Regulation*, 86 Fed. Reg. 7049-7050 (Jan. 25, 2021).
204 EEOC, *Meeting of October 13, 2016 - Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law*.
205 U.S. Education & Labor Committee, Civil Rights and Human Services Subcommittee hearing, *The Future of Work: Protecting Workers' Civil Rights in the Digital Age* (Feb. 5, 2020).

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Investigations

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions if an employer fails to provide requested information or data or to make requested personnel available for interview. The EEOC continues to exercise this option, particularly when dealing with systemic investigations.[206] As discussed below, the EEOC's authority to issue subpoenas and conduct investigations is quite broad.

1. EEOC Authority to Conduct Class-Type Investigations

Systemic investigations can arise based upon any of the following: (1) an individual files a pattern-or-practice charge or the EEOC expands an individual charge into a pattern-or-practice charge; (2) the EEOC commences an investigation based on the filing of a "commissioner's charge"; or (3) the EEOC initiates, on its own authority, a "directed investigation" involving potential age discrimination or equal pay violations.

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[207] Unlike individual litigants asserting class action claims, the EEOC need not meet the stringent requirements of Rule 23 to initiate a pattern-or-practice lawsuit against an employer. Thus, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals, beyond the charging parties, who are identified during the investigation."[208]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[209] based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a commissioner's charge, the EEOC is entitled to investigate broader claims.

Finally, the EEOC may initiate a systemic investigation under either the Age Discrimination in Employment Act or the Equal Pay Act. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute.[210]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[211] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[212] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[213] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[214]

What if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate

206 *See* Appendix D to this Report, which includes information on select subpoena enforcement actions the EEOC initiated in FY 2020.
207 *See* 42 U.S.C. § 2000e-5(b).
208 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). *But see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (denying the EEOC's attempt to subpoena information to help support an pattern-or-practice claim, when the case at issue involved one individual only).
209 *See* 42 U.S.C. § 2000e-5(b) (a charge may be filed either "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission").
210 *See, e.g.*, 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").
211 42 U.S.C. § 2000e-8(a); see also 29 U.S.C. § 626(a) (ADEA); 29 C.F.R. § 1626.15 (ADEA); 29 U.S.C. § 211 (FLSA); 29 U.S.C. § 206(d) (EPA); 29 C.F.R. § 1620.30 (EPA); EEOC Compliance Manual, § 22.7.
212 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).
213 *Shell Oil Co.*, 466 U.S. at 59.
214 *Id.*

remains unabated.[215] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[216] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[217] While the federal appellate courts have been split on this issue,[218] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC.[219]

In *Waffle House*, the Court held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[220] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[221] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[222] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority.

More recently, the Ninth Circuit in *EEOC v. VF Jeanswear LP* reaffirmed its position that the EEOC's power to investigate instances of discrimination extend beyond the allegations of the individual charging party.[223] Citing Ninth Circuit precedent, the court emphasized, "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."[224]

a. Applicable Timelines for Challenging Subpoenas (Waiver Issue)

As part of its investigatory authority, the EEOC can and does issue subpoenas to employers seeking information or data. An employer may challenge an EEOC subpoena, but may be barred from doing so in a subpoena-enforcement action in circumstances where it fails to challenge or modify the subpoena in accordance with statutorily imposed deadlines.[225] Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena, unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.[226] This requirement is set forth in the regulations governing the EEOC's investigative authority. Namely, "any person served with a subpoena who intends not to comply shall petition" the EEOC "to seek its revocation or modification . . . within five days . . . after service of the subpoena."[227]

In recent years, the EEOC has taken an aggressive stance on this "waiver" issue when dealing with employers that have generally failed to respond to its requests for information and subpoenas. The most notable case on this issue is

215 *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).

216 *EEOC v. Union Pacific Railroad*, 867 F.3d 843 (7th Cir. 2017).

217 *Union Pacific Railroad*, 867 F.3d at 845.

218 *See EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. 2019) ("there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."); *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).

219 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).

220 *Waffle House, Inc.*, 534 U.S. at 291.

221 *Union Pacific Railroad*, 867 F.3d at 851.

222 *Id.*

223 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. 2019), *petition for cert. filed*, (U.S. Oct. 1, 2019) (No. 19-446), *cert. denied* (U.S. Apr. 6, 2020).

224 *VF Jeanswear LP*, 769 Fed. Appx. 477, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

225 *See, e.g., EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. 2011) (providing a thorough discussion of the case law discussing the potential "waiver" of a right to challenge administrative subpoena); *see also EEOC v. Cuzzens of GA, Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).

226 See, *e.g., EEOC v. Chrome Zone LLC*, Case No. 4:13-mc-130 (S.D. Tex. Feb. 22, 2013) (EEOC motion to compel employer's compliance with subpoena arguing waiver by failure to file a Petition to Revoke or Modify Subpoena where the employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 14831, at **11-12 (E.D. Cal. Oct. 15, 2013); *EEOC v. Mountain View Medical Center*, Case No. 2:13-mc-64 (D. Ariz. July 30, 2013) (same). *But see EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting irrelevant information despite employer's failure to file a Petition to Revoke or Modify Subpoena, reasoning a procedural ruling was inappropriate given (1) the absence of established case law on the issue under the ADA, (2) the sensitive and confidential nature of the information subpoenaed, which related to employees' medical conditions, and (3) the fact that the employer had twice objected to the scope of the EEOC's inquiry before the enforcement action was filed).

227 29 C.F.R. § 1601.16(b)(1).

the Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[228] discussed in Littler's FY 2013 Annual Report, in which a federal appeals court supported the EEOC's position that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients. Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. In addition, although the staffing agency had filed objections to the EEOC's petition, the objections were filed *one day* beyond the statutorily required five days. The district court determined that the company's objections were waived and ordered it to comply with a broadly worded subpoena, which had been pending for more than three years, because the company filed objections with the agency six days after receipt. The Seventh Circuit agreed with this decision, finding that the defendant "has provided no excuse for this procedural failing and a search of the record does not reveal one . . . We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because [defendant] has waived its right to object."[229]

Since *Aerotek*, there have been examples where a court has disagreed with the EEOC's contention that an employer has waived objections to a subpoena due to its failure to timely or properly petition for revocation or modification of the subpoena. Those courts have scrutinized the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period, and applied the four-factor test articulated in *EEOC v. Lutheran Social Services*.[230]

In *Lutheran*, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but it also stated that the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[231] It further explained that factors that may amount to such exceptional circumstances include whether (1) the subpoena advised the recipient of the five-day petition deadline expressly or by citing the relevant law or regulation; (2) the agency investigator informed the subpoena recipient of the missed deadline; (3) the subpoena recipient repeatedly raised its objections to the agency in some form other than a revocation petition; and (4) the objections are not within the "special competence" of the EEOC.[232] The *Lutheran* court also suggested, however, that this standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[233]

Recently, a magistrate judge for the U.S. District Court for the Central District of California, whose order and recommendation was adopted by the district court, applied *Lutheran* and its progeny to evaluate whether the defendant in a subpoena-enforcement action had waived any objection to the EEOC's administrative subpoena by failing to petition the EEOC for its revocation or modification.[234] Specifically, in *EEOC v. Kaiser Foundation Hospitals*, the agency was investigating a charge filed by one of the defendant's female pharmacy technicians, which asserted sex-based discrimination and retaliation.[235] Although the charge focused largely on the actions taken against the claimant, it stated: "'I believe that females as a class have been discriminated against . . . .'"[236]

The EEOC issued a subpoena to the defendant seeking, among other things, certain information pertaining to each employee who had worked at the same facility location as the claimant.[237] This subpoena did not include a reference to 29 U.S.C. § 161(1) ("Section 161(1)"), 29 C.F.R. § 1601.16 ("Section 1601.16"), or the five-day period for filing a petition with the agency to revoke or modify the subpoena.[238] When the defendant responded to the subpoena one month after it was

228 *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013).
229 *Aerotek*, 498 Fed. Appx. at 648.
230 *EEOC v. Lutheran Social Servs.*, 186 F.3d 959 (D.C. Cir. 1999).
231 *Id.* at 959.
232 *Id.* at 964-66.
233 *Id.* at 959.
234 *EEOC v. Kaiser Found. Hosps.*, 2019 U.S. Dist. LEXIS 224297 (C.D. Cal. Dec. 11, 2019), *adopted*, 2020 U.S. Dist. LEXIS 3285 (C.D. Cal. Jan. 3, 2020).
235 *Kaiser Found. Hosps.*, 2019 U.S. Dist. LEXIS 224297, at *3.
236 *Id.*
237 *Id.* at *5.
238 *Id.* at *6. Section 161(1) expressly states that "[w]ithin five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under this control, such person may petition the Board to revoke . . . ." Section 1601.16(b) similarly provides that "[a]ny person served with a subpoena who intends not to comply shall [file a] petition . . . to seek its revocation or modification. Petitions must be mailed . . . within five days (excluding Saturdays, Sundays and Federal legal holidays) after service of the subpoena."

issued, it refused to provide any information in response to the request identified above, objecting on the grounds that the request was overbroad, burdensome, and not relevant to the claimant's allegations of harassment by a single individual.[239] The defendant also objected on the basis that the claimant would not be able to meet the requirements to pursue a class action.[240]

By the time the EEOC filed an application with the court to show cause why the subpoena should not be enforced, the defendant had not produced any information responsive to the request at issue, nor had it filed a petition to revoke or modify the subpoena.[241] The EEOC also "never notified [the defendant] of any compliance issues or failure to exhaust its administrative remedies."[242]

Applying these facts to the elements set forth in *Lutheran*, the magistrate judge determined the defendant had not waived its objections to the subpoena.[243] Specifically, the magistrate judge found that the subpoena did not inform the defendant of the five-day deadline to petition for revocation or modification, and that the EEOC had likewise failed to inform the defendant that it had missed the deadline for filing a petition.[244] The magistrate judge also determined that the defendant repeatedly had raised to the EEOC the same objections it asserted before the court.[245]

Although these first three factors weighed against waiver, the magistrate judge indicated the final factor identified by the *Lutheran* court, whether the asserted objections were not within the "special competence" of the EEOC, was less clear. The magistrate judge noted that the defendant's objections based on breadth and relevance typically weighed in favor of waiver.[246] The magistrate judge ultimately determined, however, that because the defendant's objections were "intertwined with its argument that the Charge and Notice [did] not sufficiently allege class-wide discrimination," which was a "jurisdictional prerequisite to judicial enforcement of the Charge, . . . , the Court [would] exercise its discretion to consider [the defendant's] objections notwithstanding its failure to exhaust its administrative remedies."[247] Thus, although no timely petition to challenge the EEOC's subpoena had been filed, and the objections at issue arguably broached subjects typically weighing in favor of waiver, the court allowed the challenged to proceed.

b. Procedural Issues

It is well established that to bring and maintain an enforcement action, certain procedural requirements must be met. The Fifth Circuit recently addressed whether these procedural requirements were satisfied in *EEOC v. Vantage Energy Services, Inc*.[248] Specifically, the issue on appeal was whether a "later-verified intake questionnaire" was sufficient to constitute a charge under the ADA's requirement that charge be filed within 300 days.[249]

In *Vantage Energy Services*, the claimant worked on a deep-water drillship for the defendant, and suffered a heart attack while at sea.[250] The defendant subsequently placed him on short-term disability leave, and on the day he was due to return to work, the defendant fired him, citing poor work performance.[251] The claimant, through his legal counsel, submitted a letter to the EEOC asserting the defendant had violated the ADA, and included with the letter an EEOC intake questionnaire.[252] The questionnaire included the claimant's name, address, nature of the discrimination claim, and the defendant's stated reason for the termination.[253] The claimant also checked the box at the end of the questionnaire, which stated that he "wanted 'to file a charge of discrimination' and 'authoriz[ed] the EEOC to look into the discrimination' claim," and included his unverified signature.[254]

239 *Kaiser Found. Hosps.*, 2019 U.S. Dist. LEXIS 22497, at *6.
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.* at *13.
244 *Id.* at *12.
245 *Id.*
246 *Id.*
247 *Id.* at **12-13.
248 *EEOC v. Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560 (5th Cir. Apr. 3, 2020).
249 *Id.* at **5-6.
250 *Id.* at *2.
251 *Id.*
252 *Id.*
253 *Id.*
254 *Id.* at **2-3. "Following [*Federal Express Corp. v.*] *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action. . . . Under the revised form, an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination." *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 113 (3d Cir. 2014).

After receiving the intake questionnaire from the claimant, the EEOC added a charge number to the questionnaire, handwriting it at the top of the document.[255] This number remained the same throughout the course of the matter.[256] The EEOC then sent the claimant two letters, which, respectively, acknowledged receipt of the "charge" and requested him to supplement the questionnaire with his address and phone number.[257] The defendant also received notice of the charge, but was informed no action was required pending receipt of a perfected charge.[258]

The perfected charge, belatedly received by the EEOC, was signed under the penalty of perjury and was dated more than 300 days after the claimant's termination.[259] Upon receipt of the perfected charge, the EEOC informed the defendant and requested a position statement, which the defendant submitted.[260]

After conducting an investigation, the EEOC determined there was reasonable cause to believe that the defendant violated the ADA, and the parties submitted to conciliation, which was unsuccessful, resulting in the filing of an enforcement action.[261] The defendant moved to dismiss the EEOC's complaint, arguing that it failed to exhaust administrative remedies because the formal charge was filed more than 300 days after the employee's termination.[262] The EEOC opposed the motion, asserting that the intake questionnaire, which was filed within 300 days, satisfied the requirement to exhaust administrative remedies, and it was inconsequential that the intake questionnaire was not verified pursuant *Edelman v. Lynchburg College*.[263]

Although the district court was persuaded by the defendant and dismissed the EEOC's enforcement action with prejudice, the Fifth Circuit reversed the decision, noting that the defendant's arguments, upon which the district court relied, were "all contrary to considerable precedent."[264] The Fifth Court first explained that the Supreme Court previously ruled in *Federal Express Corp. v. Holowecki*[265] that an intake questionnaire could qualify as a charge if it satisfied the charge-filing requirements and could be construed as a request for the agency to take remedial action.[266] Because the claimant's intake questionnaire in *Vantage Energy Services* identified the parties, described the action complained of, specifically, the claimant's belief that the defendant had discriminated against him by discharging him immediately after finishing his short term disability leave, and indicated that the claimant wanted to file a charge and authorized the EEOC to investigate the alleged conduct, the Fifth Circuit concluded that the intake questionnaire satisfied the *Holowecki* test.[267]

In reaching this conclusion, the Fifth Circuit noted that the EEOC's treatment of the questionnaire was ambiguous because it emphasized the need for the claimant to verify the intake questionnaire, but also had assigned it a charge number. Still, it determined that, while instructive, "the EEOC's characterization of the questionnaire is not dispositive. What constitutes a charge is determined by objective criteria."[268]

Relying on *Edelman*, the appeals court also ruled that the fact the intake questionnaire was not verified upon receipt or within the 300-day filing deadline did not render the charge untimely.[269] It explained that the purposes of the verification requirement was to protect employers from the expense and disruption of a claim unless it was supported by an oath subject to the liability for perjury.[270] The Fifth Circuit reiterated that, under *Edelman*, this purpose is maintained if the technical defect, such as a lack of verification, is corrected by the time an employer must respond to the charge.[271] Thus, because the claimant eventually complied with the verification requirement, it "related back" to the time the intake questionnaire was filed.[272]

255 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *3.
256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.* at **4-5.
260 *Id.* at *4.
261 *Id.*
262 *Id.* at **4-5.
263 *Id.* at *5, citing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).
264 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
265 *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008).
266 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
267 *Id.* at **7-9.
268 *Id.* at **9-10.
269 *Id.* at *11.
270 *Id.*
271 *Id.*
272 *Id.* at **11-12.

Finally, the Fifth Circuit rejected the defendant's argument that its due process rights would be violated if the intake questionnaire was treated as a charge because it did not receive formal notice of the charge with 10 days of the EEOC's receipt, as required by 42 U.S.C. § 20003-5(e)(1).[273] The court rejected the argument because the defendant failed to demonstrate what prejudice it suffered by the delay, and there was no evidence of bad faith on part of the EEOC.[274]

c. Confidentiality Order Regarding Information Produced to EEOC

As discussed in Littler's FY 2019 Annual Report, in *EEOC v. Service Tire Truck Centers*,[275] the defendant sought a confidentiality order regarding its responses to a number of the EEOC's information requests. There, the court applied Third Circuit precedent, which held that when a party requests a confidentiality order, it bears the burden of establishing good cause by demonstrating that "disclosure will work a clearly defined and serious injury to the party seeking closure."[276]

When evaluating whether a confidentiality order should be entered, a court must balance public interests against private interests by considering, among other factors, (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.[277]

Weighing these factors, the court determined a confidentiality order was not warranted in *Service Tire Truck Centers*. It explained that privacy interests were not implicated, and thus did not support the issuance of a confidentiality order, because the production would be made to the EEOC, which is prohibited from disclosing this information to the public "on pain of fines and criminal prosecution," rather than a private party.[278] Furthermore, because the EEOC sought the information for a legitimate purpose and the defendant had not claimed disclosure would cause embarrassment, the court found that, on balance, the above factors weigh against a confidentiality order.

There are no applicable decisions in FY 2020 addressing this issue.

3. Review of Recent Cases Involving Broad-Based Investigation by EEOC—Subpoena Enforcement

The Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until the Court's 2017 decision,[279] in which it brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth Circuit's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[280] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena; and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[281] For the Court, each favored a more deferential standard. While the Court explained that district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[282]

The EEOC usually is given wide latitude to investigate charges of discrimination, provided it can demonstrate it acted within the scope of its authority and that the information sought is relevant and reasonable in scope. As a result, a district court

273 *Id.* at *13.
274 *Id.*
275 *EEOC v. Service Tire Truck Centers*, 2018 U.S. Dist. LEXIS 178025 (M.D. Pa. Oct. 17, 2018).
276 *Service Tire Truck Centers*, 2018 U.S. Dist. LEXIS 178025, at *14, *citing EEOC v. Kronos Inc.*, 620 F.3d 287, 302 (3d Cir. 2010).
277 *Service Tire Truck Centers*, 2018 U.S. Dist. LEXIS 178025, at *14.
278 *Id.* at *15, *citing* 42 U.S.C. § 2000e-8(e). Additionally, pursuant to 5 U.S.C. § 552(b)(3), (6), personnel files and related personal information are excludable from Freedom of Information Act (FOIA) requests.
279 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
280 *McLane Co.*, 137 S. Ct. at 1170.
281 *Id.* at 1166-67.
282 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in the above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.

typically will enforce a subpoena issued by the agency, unless the subpoenaed party can show judicial enforcement of the subpoena would be an abuse of process or create an undue burden.

The district court in *EEOC v. Kaiser Foundation Hospitals* considered whether the EEOC's broad investigatory powers reached the information sought in its subpoena.[283] In that case, the claimant filed a charge based on allegations of individual discrimination, but included in the charge a single sentence asserting, "the claimant believes that females as a class have been discriminated against in violation of Title VII of the Civil Rights Act."[284] The EEOC subsequently issued a subpoena to the defendant seeking, as is relevant here, identifying details and contact information, *i.e.*, pedigree information, for all employees working at the same facility as the claimant for a specified period.[285] The defendant objected to that request, claiming it was overbroad, burdensome, not relevant to the claimant's allegations of harassment by a single individual, and that the claimant could not meet the requirements to pursue a class action.[286] The defendant later conceded, however, that pedigree information for employees who had worked, or currently worked, with the alleged bad actor, a pharmacist, was relevant, but argued it should not be required to produce such information for those employees at the same facility who had not worked with that pharmacist.[287]

In enforcing the subpoena, albeit a circumscribed version of the subpoena, the court rejected the defendant's argument, that the EEOC lacked investigatory authority over the claimant's class allegations because the charge was too conclusory to allege a class-wide discrimination.[288] In rejecting this argument, the court explained that a charge need not plead the specifics of multiple incidents of discrimination to support a claim of class-wide discrimination.[289] Relying on *Shell Oil Co.*,[290] the *Kaiser* court stated the Supreme Court has "shied away from imposing strict factual pleading requirements on charges alleging widespread discrimination," particularly given that, "when the EEOC files a pattern-or-practice discrimination charge, [the EEOC] need not 'specify the persons discrimination against' or 'the dates on which the injuries occurred' in order to satisfy [the pleading requirements of] Section 1601.12(a)(3)."[291]

Nevertheless, the district court agreed the "class part" of the claimant's charge merely alleged that the defendant had violated Title VII, which, standing alone, would be insufficient to assert class-wide discrimination.[292] Considering the charge as whole, however, the court concluded that it "may infer from the totality of the allegations that [the claimant was] asserting either that the Pharmacist discriminated against other women in the manner he allegedly discriminated against [the claimant] or that [the defendant] ha[d] discriminated against other women in the way that it addresse[d] complaints of sexual harassment," which the court did find to be sufficient to raise the "specter of systemic discrimination."[293]

Although the district court determined that class-wide discrimination was alleged sufficiently, it still found it necessary to revise the pedigree information sought by the EEOC. Specifically, it determined that the pedigree information of those employees who worked with the pharmacist was relevant to the allegations of systemic discrimination, but the court concluded that the EEOC had not articulated a clear basis for seeking the pedigree information for all employees.[294] By way of example, it stated that, "on the state of the record, it [was] not evident to the Court how interviewing, *e.g.*, IT employees would shed light on" a discriminatory practice affecting female employees who may have encountered the pharmacist or who may have submitted complaints of sexual harassment.[295] The court, therefore, limited the pedigree information to be produced to only current and former employees working in the pharmacy or related departments and female employees who submitted claims of sexual harassment.[296]

In making this ruling, the court also rejected the defendant's claim that this information would be burdensome to produce because gathering the information allegedly would take one employee more than one month to complete.[297] The district

283 *Kaiser Found. Hosps.*, 2019 U.S. Dist. LEXIS 224297.
284 *Id.* at **4-6, 13.
285 *Id.* at **5-6, 13.
286 *Id.* at *6.
287 *Id.* at **13-14.
288 *Id.* at **14-20.
289 *Id.* at **14-15.
290 *Shell Oil Co.*, 466 U.S. 54.
291 *Kaiser Found. Hosps.*, 2019 U.S. Dist. LEXIS 224297, at *16, quoting *Shell Oil Co.*, 466 U.S. at 70. Section 1601.12(a)(3) identifies the required contents of a charge.
292 *Kaiser Found. Hosps.*, 2019 U.D. Dist. LEXIS 224297, at *18.
293 *Id.*
294 *Id.* at *21.
295 *Id.* at **21-22.
296 *Id.* at *24.
297 *Id.* at *22.

court explained that the defendant's claimed "burden" did little to convince it that the company's normal operating costs would be significantly increased or that its business operations would be severely impacted, which was the relevant inquiry for evaluating burden.[298]

More information on the EEOC's subpoena enforcement activities for FY 2020 can be found in Appendix D to this Report.

B. Conciliation Obligations Prior to Bringing Suit

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[299] Only after pursuing such conciliation attempts may the EEOC file a civil action against the employer.[300] If the EEOC fails to conciliate in good faith prior to filing suit, the court may stay the proceedings to allow for conciliation or dismiss the case.

As discussed in Part III of this Report, the EEOC recently published its final regulations updating its conciliation procedures.[301] Generally, the final regulations require that in all conciliations, the EEOC must, among other steps, (a) provide the respondent with a written statement of the known facts and non-privileged information that form the basis of the allegations; (b) provide the respondent with a written summary of the legal basis for the allegation(s); (c) provide a written basis for any monetary or other relief including the calculations underlying the initial conciliation proposal, and an explanation thereof; (d) advise the respondent in writing that the Commission has designated the case as systemic, class, or pattern or practice, if the designation has been made at the time of the conciliation, and the basis for the designation; and (e) provide the respondent at least 14 calendar days to respond to the Commission's initial conciliation proposal. It is expected that these regulations may be revisited once the Democratic members constitute a majority on the Commission.

Employers in recent years have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[302] In this case, the Court held that the EEOC's attempts to conciliate a discrimination charge prior to filing a lawsuit *are* judicially reviewable, but that the EEOC has broad discretion in the efforts it undertakes to conciliate.

Specifically, the Court held that to meet its statutory conciliation obligation, the EEOC must inform the employer about the specific discrimination allegation(s), describing what the employer has done and which employees (or class of employees) have suffered. It also held that the EEOC must try to engage the employer in discussion to give the employer a chance to remedy the allegedly discriminatory practice. It then concluded that judicial review of whether these requirements are met is appropriate, but "narrow." In its view, a court is just to conduct a "barebones review" of the conciliation process and is not to examine positions the EEOC takes during the conciliation process, since the EEOC possess "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

The Court noted that a sworn affidavit from the EEOC, stating that it has performed these obligations, generally would suffice to show that the agency has met the conciliation requirement, provided that if an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or try to engage in a discussion about conciliating the claim, then a reviewing court would have to conduct "the fact-finding necessary to resolve that limited dispute." The Court then held that, even if a court finds for an employer on the issue of the EEOC's failure to conciliate, the appropriate remedy merely is to order the EEOC to undertake the mandated conciliation efforts. Thus, while some courts previously had dismissed lawsuits based on the EEOC's failure to meet its conciliation obligation, that remedy appears no longer to be available based on the Court's decision.

On remand, the EEOC moved to strike part of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[303] The U.S. District Court for the Southern District of Illinois held that because the Supreme Court determined that "[a] court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions," it would grant

298 *Id.* at **22-23.
299 42 U.S.C. § 2000e-5(b).
300 42 U.S.C. § 2000e-5(f)(1).
301 EEOC, *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).
302 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
303 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).

the motion to strike and would bar the parties from "disclosing anything said or done during and/or as part of the informal methods of 'conference, conciliation, and persuasion.'"[304] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[305]

Courts continue to clarify how charges and conciliations affect the EEOC's authority to investigate and litigate.

1. Impact of *Mach Mining*

In *EEOC v. Magneti Marelli of Tennessee, LLC*, the U.S. District Court for the Middle District of Tennessee relied upon the "barebones review" supported by the Supreme Court in *Mach Mining* to grant the EEOC's partial motion for summary judgment on the defendant's defense of a failure to conciliate.[306] The defendant argued that the EEOC did not satisfy the conciliation requirement because it refused to provide the number of class members, their identity, and the parameters of the class during conciliation.[307] Instead, the EEOC notified the defendant that the charge was filed on behalf of the claimant and a class of female employees who were sexually harassed by their supervisor.[308]

Noting that the EEOC had provided the defendant with information akin to what was provided in *Mach Mining*, and further explaining that judicial review of the EEOC's conciliation efforts is limited, the district court held that the EEOC met its statutory conciliation duty.[309] It declined to scrutinize further the identification of class members based on the "high level" of judicial review given to conciliation attempts.[310]

The U.S. District Court for the Northern District of New York, in *EEOC v. Birchez Associates, LLC*, reached a similar conclusion by also conducting a "barebones review" of the EEOC's conciliation efforts.[311] In that case, the defendants filed a motion to stay the action, claiming the EEOC had failed to meet its statutory obligation to engage in conciliation prior to bringing a lawsuit.[312] The EEOC offered a sworn declaration in response to the motion, "attesting to its compliance with both the notice of the charges requirement and the attempt to conciliate requirement."[313] Because the Supreme Court, in *Mach Mining*, stated that such an affidavit typically would suffice to show the EEOC's compliance with the conciliation requirement, the district court concluded that its "relativity barebones review" indicated that a stay was not warranted.[314] In light of the "limited scope of review" available to the court, the district court did not find the defendants' claims that it was not given a sufficient number of days to respond to the conciliation offer, or that the EEOC failed to meaningfully engage in a dialogue, even if true, was a sufficient basis to stay the action.[315]

The District of Maryland also recently applied *Mach Mining* when considering class scope. Specifically, in *EEOC v. Baltimore County*, the defendant argued that the scope of the class was limited to only those the EEOC had identified in correspondence during the ADEA-mandated conciliation efforts because the EEOC failed to adhere to the conciliation requirement for other employees.[316]

In addition to finding this argument waived because the defendant waited approximately 13 years to raise it as a defense, the district court ultimately found it meritless in view of *Mach Mining*.[317] Citing to the Supreme Court's ruling in *Mach Mining*, the court noted that for the EEOC to satisfy the conciliation requirement, it "need only 'communicate in some way about "an alleged unlawful employment practice" and "endeavor" to achieve compliance.'"[318] It then found that the EEOC had, in fact, satisfied the conciliation requirement by informing the defendant, in its determination letter, of the class of employees, which specifically included those "within the protected age group during the relevant period . . . [and] who made excessive contributions to the Employee Retirement System."[319] The district court found that the content of this letter indicated that "the EEOC was seeking conciliation for all employees protected by the ADEA who were discriminated against in contribution

304 *Id.* at 635-636.
305 *Id.* at 635.
306 *EEOC v. Magneti Marelli of Tenn.*, LLC, 2020 U.S. Dist. LEXIS 32804, *20-22 (M.D. Tenn. Feb. 26, 2020).
307 *Id.* at *20.
308 *Id.* at *21.
309 *Id.*
310 *Id.*
311 *EEOC v. Birchez Assocs., LLC*, 2020 U.S. Dist. LEXIS 46664 (N.D.N.Y. Mar. 18, 2020).
312 *Id.* at *1.
313 *Id.* at *3.
314 *Id.*
315 *Id.* at **3-4.
316 *EEOC v. Balt. Cty.*, 2019 U.S. Dist. LEXIS 185913, at **19, 21-22 (D. Md. Oct. 28, 2019).
317 *Id.* at **21-22.
318 *Id.* at *21, quoting *Mach Mining, LLC*, 135 S. Ct. at 1655.
319 *Balt. Cty.*, 2019 U.S. Dist. LEXIS 185913, at *22.

rates."[320] Thus, the court concluded that there was no basis to narrow the scope of the class based on a failure to engage in conciliation efforts because the EEOC may have, at one point, referenced a narrower class.[321]

2. EEOC's Challenge that any Conciliation Obligation Exists in Pattern-or-Practice Claims Under Section 707

Although there were no cases over the past fiscal year addressing the conciliation obligation in pattern-or-practice cases under Section 707, employers are reminded that in circumstances in which the EEOC solely relies on Section 707 in any "pattern or practice" lawsuit against an employer, the EEOC cannot circumvent its obligation to engage in conciliation prior to filing suit.

In *EEOC v. CVS Pharmacy, Inc.*,[322] the EEOC argued that Section 707(a) of Title VII authorizes it to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without alleging that the employer engaged in discrimination and without following any of the pre-suit procedures contained in Section 706, including conciliation. Specifically, the EEOC argued that Section 707(a) creates an independent power of enforcement to pursue claims alleging a pattern or practice "of resistance" and that Section 707(e), by contrast, requires only that claims alleging a pattern or practice "of discrimination" comply with Section 706 procedures.[323] The Seventh Circuit rejected this argument, holding that "there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," and that "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding."[324] Adopting the EEOC's interpretation, the court reasoned, would read the conciliation requirement out of Title VII because the EEOC could always contend that it was acting pursuant to its broad authority under Section 707(a).[325] Noting that the EEOC's interpretation would undermine both the spirit and letter of Title VII, the court held that the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues pattern-or-practice violations.[326]

3. Admissibility of Evidence of Substance of Conciliation

Title VII expressly provides that nothing said or done during the conciliation process "may be used as evidence in a subsequent proceeding without the written consent of the persons concerned."[327] In *EEOC v. CRST Int'l, Inc.*, the Northern District of Iowa granted the EEOC's motion to strike from the record a letter containing proposed terms of conciliation.[328] In so doing, the court rejected the employer's arguments that the letter was essential to its ability to disprove one of the EEOC's allegedly undisputed facts, that the EEOC had waived the statute's confidentiality protections by initiating a dispute regarding the substance of conciliation, and that the letter was admissible under Fed. R. Evid. 408. Significantly, the court also held, citing *Mach Mining*, that sealing the letter, as opposed to striking the letter entirely, would not serve the purpose of guaranteeing the parties that their conciliation efforts would not "come back to haunt them in litigation."[329]

320 *Id.*
321 *Id.*
322 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
323 *Id.* at 340-41.
324 *Id.* at 341-42.
325 *Id.* at 342.
326 *Id.* at 343. *But see EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015), in which a district court took the opposite view.
327 42 U.S.C. § 2000e-5(b).
328 *EEOC v. CRST Int'l*, Inc., 351 F. Supp. 3d 1163, 1174 (D. Iowa 2018).
329 *Id. at* 1175, citing *Mach Mining*, 135 S.Ct. at 1655.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Motion to Dismiss/Scope of Complaint

Although the courts have continued to be liberal in construing the EEOC's complaints where a motion to dismiss is filed, some basic pleading requirements must still be met. For example, a federal district court in Florida placed some limitations on the liberal pleading standard, requiring the EEOC to plead separate counts for each of its claim.[330] In this case, the EEOC filed a complaint against the employer alleging Title VII race discrimination. The employer moved to dismiss, and in response, the EEOC asserted that the employer misunderstood its legal theories, which included claims for both disparate impact and disparate treatment under Title VII. When the employer sought leave to file a reply in support of its motion to dismiss, the court terminated the motion to dismiss and motion for leave to file a reply, opining that the EEOC had failed to set forth its claims of disparate impact and disparate treatment separately and rejecting the EEOC's argument that it was not necessary to do so. Citing to F.R.C.P. Rule 10(b), the court explained, "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence … must be stated in a separate count."[331] Because separating the disparate impact and disparate treatment claims would promote clarity, the court directed the EEOC to file an amended complaint with separate counts and facts in support of each count.

In a unique circumstance, a district court in Texas considered a motion to dismiss filed by the EEOC. The employer brought an Administrative Procedure Act (APA) action against the EEOC, challenging the validity of an EEOC charge and seeking declaratory and injunctive relief on judicial review of the EEOC's issuance of right-to-sue letters.[332] In 2012, the employer received notice of a commissioner's charge stating that the EEOC was investigating the employer for possible ADA and GINA violations. Six years later, in 2018, the EEOC concluded its investigation and issued 54 right-to-sue letters. The employer filed the APA action, and the EEOC moved to dismiss, arguing that the court lacked subject matter jurisdiction because a right-to-sue letter did not constitute a final agency action that is subject to judicial review. The court disagreed, finding that a right-to-sue letter satisfied both prongs of finality, because the EEOC had "ruled definitively," and the right-to-sue letter was an action from which legal consequences would flow. The court also determined that the employer sufficiently alleged a legal wrong and was without an adequate alternative remedy to remedy that wrong. Accordingly, the court held that the issuance of a right-to-sue letter constituted a "final agency action" that was subject to judicial review, and denied the EEOC's motion to dismiss for lack of subject matter jurisdiction.

2. Lack of Particularity

A case out of Washington, D.C. demonstrated that courts may impose a low particularity hurdle for pleading by the EEOC, allowing complaints to survive a motion to dismiss even when the EEOC does not plead all the elements of a *prima facie* case. In this case, the EEOC brought suit against the employer, alleging Title VII and Equal Pay Act violations.[333] The crux of the EEOC's complaint were allegations that a female employee was paid significantly less than her male counterpart for substantially similar work, and that the employer failed to provide the female employee with promotion opportunities, subjecting her to disparate terms and conditions of employment. The employer moved to dismiss for failure to state a claim, in part because the EEOC failed to attach the job description and job posting for two jobs at issue in the Equal Pay Act Claim. The court opined that, "[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a *prima facie* case."[334] The court reasoned the extent to which the employee's job duties differed from her job posting or from the comparator job description did not matter at that stage, as the EEOC had pled facts sufficient to state a claim by stating that the female employee was being paid less than a male employee for substantially similar work. With respect to the Title VII claim, the court held that at the pleading stage, "[m]erely alleging that the employer's proffered reasons for the adverse employment actions is [sic] false may support an inference of discrimination sufficient to survive a motion to dismiss."[335] The EEOC had pled facts that could plausibly support a reasonable inference that the employer had violated Title VII. Therefore, the court denied the employer's motion to dismiss the EPA and Title VII claims.

330 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).
331 *Id.* at *2.
332 *BNSF Railway Co. v. EEOC*, 2018 U.S. Dist. LEXIS 226251 (N.D. Tex. Nov. 27, 2018).
333 *EEOC v. George Wash. Univ.*, 2018 U.S. Dist. LEXIS 77605 (D.D.C. May 8, 2019).
334 *Id.* at **13-14.
335 *Id.* at *20 (internal citation omitted).

Similarly, in a case out of Pennsylvania, the court denied the defendant's motion to dismiss the EEOC's lawsuit, allowing the EEOC to proceed without identifying an adverse employment action in a failure to accommodate a religious practice claim.[336] In response to the defendant's claim that the EEOC failed to plead facts identifying a materially adverse employment action, the court said the EEOC sufficiently met the notice stage of pleading as the complaint is required only to contain sufficient factual matter "to raise the right to relief above the speculative level" and "state a claim that is plausible on its face."[337] In this case, the court concluded it was adequate that the Complaint stated the charging party believed he would be fired if he took off more days for religious purposes because this allegation was sufficient to support a reasonable expectation that discovery will generate sufficient evidence to support the element of a materially adverse employment action.[338]

Furthermore, a case out of North Carolina showed that an EEOC charge need not specify every claim the EEOC files in court so long as the allegations in the charge put the employer on notice of the claim.[339] There, the defendant argued the EEOC had not exhausted its administrative remedies because the charge had not expressly referenced a hostile work environment claim.[340] The charging party had alleged in his charge that he was "sexually harassed on numerous occasions by a cook" and that he "physically touched my genitals on more than one occasion."[341] The charging party also identified the alleged "harasser, the harassment, alleged [the harassment] occurred on multiple occasions, and described how, despite his complaints to management, no action was taken against the male co-worker."[342] The court found that even though the charging party did not specify that he was claiming hostile work environment in his charge, the details in the charge were sufficient to put the defendant on notice of the purported harassment, and therefore, the EEOC was able to demonstrate all administrative remedies were exhausted prior to its bringing the lawsuit.[343]

3. Key Issues in Class-Related Allegations

a. Disparate Impact Claims

In recent years, several courts have found an expansive view of the EEOC's ability to bring claims on behalf of litigants. In fact, a court in the District of Columbia found that because the EEOC allegedly uncovered evidence of wide-spread harassment and retaliation, "the EEOC is permitted to bring claims on behalf of those affected, regardless of whether or not those affected would be prohibited from bringing their own Title VII claims due to a failure to exhaust."[344]

b. Special Issues Regarding ADEA Claims

On occasion, claims arising under the ADEA differ from EEOC enforcement actions of other federal statutes, such as Title VII. In New York, a district court magistrate judge addressed the question in his report and recommendation of whether the EEOC is limited by the 300-day statute of limitations period of the individual charge underlying the enforcement action in its ability to seek redress for statutory violations.[345] In this case, the employer filed a partial motion to dismiss the EEOC's complaint, arguing that the EEOC's alleged violations of Title VII, the ADA, and the ADEA occurred outside the 300-day window established by the aggrieved employee's administrative charge, and therefore were time-barred. The matter was referred to a federal magistrate judge who ultimately recommended that the district judge deny the employer's motion, but on slightly different grounds for the Title VII and ADA claims than for the alleged ADEA violations. Regarding the Title VII and ADA claims, the magistrate judge reasoned that the EEOC was not limited to the claims presented by the charging party, and the charge merely provided the EEOC with jurisdiction for its investigation. Accordingly, despite conflicting cases in other Circuits, the Western District of New York court ruled the EEOC could pursue claims that were discovered during the EEOC's investigation but fell outside of the 300-day time period. For an

336 *EEOC v. Center One, LLC*, No. 2:19cv1242, 2020 U.S. Dist. LEXIS 180230, at **4, 6 (E.D. Pa. Sept. 30, 2020).
337 *Id.* at *2.
338 *Id.*
339 *EEOC v. 1618 Concepts, Inc.*, No. 19-cv-672, 2020 U.S. Dist. LEXIS 2090, at ** 5-10 (M.D.N.C. Jan. 7, 2020).
340 *Id.*
341 *Id.* at *8.
342 *Id.*
343 *Id.* at **7-8 (distinguishing from *Keener v. Universal Cos. Inc.*, 128 F. Supp. 3d 902 (M.D.N.C. 2015) where "no part of her EEOC charge described facts that could be attributable to a hostile work environment claim").
344 *EEOC v. Sol Mexican Grill, LLC*, No. 18-2227 (CKK), 2019 U.S. Dist. LEXIS 195484, *18 (D.D.C. Nov. 12, 2019) (citing *EEOC v. Kronos Inc.*, 620 F.3d 287, 297 (3d Cir. 2010) ("Once the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge."); *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1205 (9th Cir. 2016) (explaining that "an EEOC civil suit may allege any discrimination stated in the charge itself or discovered in the course of a reasonable investigation of that charge").
345 *EEOC v. Staffing Solutions of WNY*, 2018 U.S. Dist. LEXIS 207186 (W.D.N.Y. Dec. 6, 2018).

ADEA claim, however, the magistrate judge concluded that the EEOC's power to investigate and litigate violations of the ADEA was not dependent on the filing of an aggrieved employee's administrative charge at all, and that "ADEA actions are indisputably not subject to the 300-day charge-filing period applicable to private actions."[346] Thereafter, the district court accepted the recommendation of the magistrate judge and denied the defendant's partial motion to dismiss.[347]

If the aggrieved employee wishes to intervene in an ADEA action, the employee must do so within 90 days of receipt of a right-to-sue letter. In a case arising in Texas, the Fifth Circuit heard an appeal of a district court's denial of an individual's motions both to join and to intervene in an ADEA enforcement action.[348] The individual seeking to intervene in the EEOC's enforcement action against the employer was a former employee whose administrative charge of alleged ADEA violations spurred the EEOC to investigate and bring an action against the employer. The former employee had been issued a right-to-sue letter at the close of the investigation. The Fifth Circuit determined it lacked jurisdiction to review the district court's decision not to allow the employee to join the suit because the district court's consent decree was not a "final order," which would make the employee's motion appealable. On the employee's motion to intervene, the Fifth Circuit affirmed the decision of the district court, holding that the district court did not abuse its discretion in denying the employee's motion to intervene because the employee had not filed an individual lawsuit within the 90-day period set forth in the right-to-sue letter.

Notably, a court in Maryland held that the EEOC is not required to adhere to the procedural requirements of collective actions under the Fair Labor Standards Act (FLSA) when pursuing an ADEA enforcement claim to pursue back pay on behalf of aggrieved employees.[349] Although "[c]ollective actions under § 16(b) require employees to 'opt-in,' or consent, to suit", "Section 16(c) does not explicitly require the Secretary of Labor to obtain the consent of employees before pursuing an action to recover wages on their behalf."[350] The EEOC asserted, and the court agreed, that the EEOC's ADEA claim was governed by the procedural requirements of Section 16(c) rather than Section 16(b) of the FLSA. As a result, the EEOC was not required to obtain the consent of employees before pursuing an ADEA enforcement action to recover back pay on their behalf.[351]

c. Challenges to Pattern or Practice Claims

In a decision out of the District of Colorado, the defendant filed motions for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) 10 years after the commencement of the case and several years after the filing of the operative complaints for the matter.[352] The EEOC argued that the motions were untimely because they were filed "over eight years after the close of the pleadings and over six years after the dispositive motions deadline."[353] In this case, the trial court had bifurcated the trial (and discovery), with Phase I addressing pattern or practice claims, and Phase II involving pattern or practice claims that were not bifurcated, individual claims for damages and other non-overlapping discrimination claims. The defendant argued that the motions were timely because "the Court has not yet entered any scheduling orders for Phase II, no discovery has occurred during Phase II, and…no Phase II trials have been set."[354] The court disagreed with the EEOC that the delay in filing the motions for judgment was "excessive" because the defendant had waited until after the end of Phase I discovery to file its motions for judgment on the pleadings.[355] In addition, the EEOC and intervenors did not argue that they would be prejudiced if the court ruled on defendant's motions.[356]

In the defendant's motions for judgment on the pleadings, it claimed that the EEOC's "remaining non-pattern or practice claims" should be dismissed because the complaint contains "no particularized allegations demonstrating that any specific individual has a plausible claim for relief."[357] In other words, defendant claimed the EEOC "stands in the shoes of the individuals" and must allege specific factual allegations as to each potentially aggrieved individual in order

346 *Id.* at *5 (internal citation omitted).
347 *EEOC v. Staffing Sols. of WNY, Inc.*, No. 18-CV-562, 2020 U.S. Dist. LEXIS 40474, at ** 5-6 (W.D.N.Y. Mar. 9, 2020).
348 *EEOC v. JC Wings Enterprises, LLC*, 2019 U.S. App. LEXIS 26465 (5th Cir. Aug. 30, 2019).
349 *EEOC v. Balt. Cty.*, No. RDB-07-2500, 2019 U.S. Dist. LEXIS 185913, at *7 (D. Md. Oct. 28, 2019).
350 *Id.* at *8.
351 *Id.* at **9-10 (citing *EEOC v. City of Chicago*, No. 85 C 8327, 1987 U.S. Dist. LEXIS 7324, 1987 WL 15388, at *1 (N.D. Ill. 1987)).
352 *EEOC v. JBS USA, LLC*, No. 10-cv-02103-PAB-KLM, 2020 U.S. Dist. LEXIS 154371, at *10 (D. Colo. Aug. 25, 2020).
353 *Id.* at *12.
354 *Id.* at **12-13.
355 *Id.* at **13-14.
356 *Id.* at *14.
357 *Id.* at *16.

to sufficiently state a claim.[358] The court disagreed, "find[ing] that the EEOC is not required to plead individualized or particularized facts as to each charging party in order to state a claim."[359]

Moreover, defendant also argued that the EEOC's discrimination claim should be dismissed based on suspensions and terminations following a September 2008 walkout because the EEOC failed to "identify which individuals were disciplined or discharged for the walkout, or delineate, which individuals were employed only before or after the walkout…"[360] Again, the court found that the EEOC was "not required to plead such particularized facts in order to state a claim."[361] Because the EEOC adequately pled the claims the defendant challenged, the court denied the defendant's motion for judgment on the pleadings.

d. Special Issues Regarding ADA Claims

When the parties disagree whether an employee's request for leave was "indefinite" in nature, the underlying claim can survive a motion to dismiss. In a FY 2020 case arising in the Philadelphia, the court considered whether a charging party's request for an indefinite leave of absence was an unreasonable accommodation and therefore subject to a motion to dismiss.[362]

The charging party worked as a criminal defense attorney for juveniles. She began therapy in July 2017, and subsequently took a leave of absence under the FMLA. The charging party's therapist noted that the "plan" was for the complainant to return to her job in January 2018. However, the therapist could not affirmatively indicate whether the return date was "feasible." After receipt of the therapist's note, the employer quickly terminated the charging party's employment, contending that her requested leave was indefinite in nature and therefore unreasonable. The EEOC sued. The employer filed a motion to dismiss, arguing that it granted all requests for leave (including short-term and long-term disability benefits), and that the only request for accommodation denied was the request for an indefinite leave—which Defendant contended was unreasonable as a matter of law. The EEOC did not dispute that an indefinite leave is an unreasonable accommodation. Instead, the EEOC disputed whether the requested leave was actually "indefinite" in nature.

The court held that the therapist's statement—that the charging party "was unable to say whether a return in January 2018 would be *feasible*—can, in a vacuum, reasonably be seen as either simply hedging on the plan for a January 2018 return, as [the] EEOC argue[d], or as demonstrating that the charging party's request was for an indefinite leave, as the defendant argue[d]."[363] In light of same, the court found questions of facts remained and thus denied the defendant's motion to dismiss.

e. Special Issues Regarding Equal Pay Act Claims

In the Southern District of Florida, the district court held that the EEOC set forth sufficient allegations of pay discrimination under the EPA to survive a motion to dismiss.[364]

The EEOC alleged the University of Miami (University) violated federal law (EPA and Title VII) by paying a female professor less than a male counterpart for performing equal or similar work. The University moved to dismiss the claims, relying, among other things, on the Fourth Circuit case *Spencer v. Virginia State University*,[365] which granted summary judgment to Virginia State University because the male and female professors did not engage in equal work. The court disagreed *Spencer* controlled, and reasoned that this case was distinguishable. To demonstrate equal work, the court noted, "the controlling factor under the Equal Pay Act is *content*—the actual duties the respective employees are called upon to perform. The statute does *not* require the plaintiff and the comparator to have identical jobs," but rather "substantially equal job content."

Notwithstanding, the University argued that the EEOC and the charging party/intervenor failed to state a claim because they had not established that she and the male professor performed equal work. The court disagreed. The EEOC alleged that the University paid the male professor a higher salary although the two professors shared similar job duties,

358 *Id.* at **16-17.
359 *Id.* at *24.
360 *Id.* at *25.
361 *Id.* at *26.
362 *EEOC v. Defender Ass'n of Phila.*, 408 F. Supp. 3d 621, 624 (E.D. Pa. 2019).
363 408 F. Supp. 3d at 627.
364 *EEOC v. Univ. of Miami*, 2019 U.S. Dist. LEXIS 207831, **6-10 (S.D. Fla. Dec. 3, 2019).
365 *Spencer v. Virginia State University*, 919 F.3d 199 (4th Cir. 2019).

taught similar classes, worked in the same department, had similar positions, and the female professor had a longer teaching experience (two more years), and more extensive publication count. When viewed in sum, the court found the EEOC alleged sufficient facts to sustain an EPA claim and therefore denied the University's motion to dismiss.

f. Other Issues – Not Naming the Appropriate Entity

The EEOC's failure to name the proper entity in the charge may not be sufficient to dismiss the unnamed party if that party had received sufficient notice of the EEOC conciliatory efforts and participated in EEOC proceedings. In January 2020, the Middle District of North Carolina considered whether the court should grant the defendant's motion to dismiss on jurisdictional/failure to exhaust administrative remedies grounds, as the charging party did not name the correct party (*i.e.*, "1618 Concepts" instead of "1618 Downtown and Northern Lights").[366]

The charging party alleged he was sexually harassed, and was told to find another job quickly when he complained. In his EEOC charge, he did not specifically name the appropriate party. Defendant moved to dismiss on the grounds the charging party named an improper entity. With respect to the naming issue, the court examined many factors, including (1) the similarity of interest between the named party and the unnamed party; (2) whether the plaintiff could have ascertained the identity of the unnamed party at the time the EEOC charge was filed; (3) whether the unnamed party received adequate notice of the charges; (4) whether the unnamed party had an adequate opportunity to participate in the conciliation process; (5) whether the unnamed party was actually prejudiced by its exclusion from the EEOC proceedings; and (6) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. When taken together, the court found that the dual purposes of the naming requirement had been satisfied, and that the defendants had actual notice of the charge and were permitted to participate in conciliation. Accordingly, the court denied the defendants' motion to dismiss.

4. Who is the Employer?

In FY 2020, several district courts addressed the liability of successive and inter-related entities for claims brought by the EEOC.

In the Southern District of California, a district court granted the EEOC leave to add an acquiring company as a defendant in a sex discrimination lawsuit, after the former owner dissolved and settled with the EEOC.[367] Prior to the lawsuit, two companies acquired a country club from the dissolved entity and allegedly "collectively operated as a direct single employer and/or as joint employers."[368] While one acquiring company was named as a defendant, the EEOC subsequently sought leave to name the second acquiring company, add facts to its complaint, and remove the former owner as a defendant.[369] The court found the EEOC demonstrated diligence and good cause because it actively attempting to obtain new information to support the amendment and consistently sought to resolve the issue by conferring with the defendant.[370] The defendant failed to show it would be prejudiced, since discovery remained open for several months and the second acquiring company was aware of the allegations since the charge and participated in the investigation and conciliation process.[371] Similarly, the defendant failed to show the EEOC's single or joint employer theory was futile because it could reasonably be inferred that the acquiring entity employed and/or controlled the charging party and other class members at the time of the alleged discrimination.[372]

In a decision out of the District of Columbia, the district court declined to dismiss an employer not named in the charge because it had notice of the EEOC proceedings, an opportunity to participate in conciliation, and an identity of interest with the named party.[373] While the charge named Sol Mexican Grill I, the lawsuit included Sol Mexican Grill II—different restaurant locations where the charging parties worked.[374] The court noted previously recognized exceptions to the charge-filing requirement where unnamed parties have "*actual notice* of the EEOC proceeding or have an identity of interest with the party or parties sued before the EEOC."[375] The court also noted the importance of allowing the unnamed party "the opportunity to

366 *EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595, 599, 2020 U.S. Dist. LEXIS 2090, *1 (M.D.N.C. Jan. 7, 2020).
367 *EEOC v. Bay Club Fairbanks Ranch, LLC*, 2020 U.S. Dist. LEXIS 133620 (S.D. Cal. July 28, 2020).
368 *Id.* at **2-3.
369 *Id.* at *3.
370 *Id.* at **6-7.
371 *Id.* at **7-9.
372 *Id.* at **14-15.
373 *EEOC v. Sol Mexican Grill, LLC*, 2019 U.S. Dist. LEXIS 195484, at *2 (D.D.C. Nov. 12, 2019).
374 *Id.* at **6-7.
375 *Id.* at *21 (*quoting EEOC v. Metzger,* 824 F. Supp. 1, 4 (D.D.C. 1993)) (citations omitted).

participate in conciliation proceedings aimed at voluntary compliance," and determined the EEOC met its statutory obligations to conciliate with both defendants.[376]

A district court in the Western District of Oklahoma considered a motion to dismiss raising an integrated employer issue, again related to defendants not specifically named in the charge.[377] All but one defendant argued administrative remedies were not exhausted as to them because the underlying charges named on particular automotive dealership.[378] In response, the EEOC filed an exception because defendants "collectively constitute a single employer and single integrated enterprise…."[379] The court recognized the single employer test can satisfy the exhaustion requirement and involves weighing four factors: (1) interrelations of operation, (2) common management, (3) centralized control of labor relations and (4) common ownership and financial control.[380] The court concluded the complaint plausibly alleged a single employer theory of liability, noting: the entities used the fictitious name "Steve Landers Auto Group" and held themselves out as a single enterprise; one defendant provided administrative services to the named automotive dealership; various individuals had duties for multiple defendants; job openings were advertised on the same website for the various defendants; managers of one entity exercised control over employees of various defendants; and the charging party overheard one of these managers make a discriminatory comment about her.[381]

In a decision out of the Middle District of North Carolina, the court applied the integrated employer factors discussed above and found the allegations highly suggestive of collective control.[382] The defendants argued for dismissal in part because the charge named only one entity, and they argued for application of a joint employment theory to determine whether these entities were employers.[383] But the court held the integrated employer theory was the proper approach, noting that traditionally the control of labor operations is the most important factor because it speaks most directly to the control between the employers at issue.[384]

In the Western District of Missouri, a district court considered a motion to dismiss based on the failure to name both entities in the charge.[385] The movant argued the charging party did not administratively exhaust her claim because her charge named one entity and the complaint failed to plead sufficient facts to plausibly allege the second entity was her employer.[386] In response, the EEOC argued the allegations satisfied the single-employer exception to the charge-filing requirement.[387] The court acknowledged the Eighth Circuit has recognized an exception when the named and unnamed entities constitute a "single employer," based on an evaluation of four factors under the single employer test.[388] The EEOC alleged the defendants shared overlapping board members and officers (all family members), there was common oversight and management, and both defendants were engaged in the hotel business and specifically with the same hotel and shared the same address.[389] Thus, the court found sufficient facts to allege defendants were a "single integrated entity" and denied the motion to dismiss.[390]

Building on decisions from FY 2019, courts in FY 2020 also addressed joint-employment issues. Following the Ninth Circuit's adoption of the common-law agency test for joint employment last year,[391] in the same case involving two fruit-growing operations, the District Court for the Eastern District of Washington subsequently discussed the limits of joint employer status in rejecting the EEOC's partial motion for summary judgment.[392] The EEOC asserted the Ninth Circuit opinion and the summary judgment record demonstrated that "Growers ignored their non-delegable duty to prevent and correct the discrimination, hostile work environment, and constructive discharge that arose from Growers' failure to ensure that

376 2019 U.S. Dist. LEXIS 195484, at *15 (*quoting Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890, 905 (7th Cir. 1981)) (citations omitted).
377 *EEOC v. LL Oak Two LLC*, 2020 U.S. Dist. LEXIS 41258 (W.D. Okla. Mar. 10, 2020).
378 *Id.* at *2.
379 *Id.*
380 *Id.* at **5-6 (*citing Sandoval v. Boulder Reg'l Communs. Ctr.*, 388 F.3d 1312, 1322 (10th Cir. 2004)).
381 *Id.* at **6-7.
382 *EEOC v. 1618 Concepts, Inc.*, 2020 U.S. Dist. LEXIS 2090, at *19 (M.D.N.C. Jan. 7, 2020).
383 *Id.* at **5, 18.
384 *Id.* at **18-19.
385 *EEOC v. Vinca Enters.*, 2020 U.S. Dist. LEXIS 117048 (W.D. Mo. July 2, 2020).
386 *Id.* at *3.
387 *Id.* at *2.
388 *Id.* at *3 (W.D. MO. July 2, 2020) (*citing Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985); *Kizer v. Curators of University of Missouri*, 816 F. Supp. 548, 551 (E.D. Mo. 1993)).
389 2020 U.S. Dist. LEXIS 117048, at *4.
390 *Id.* at *1.
391 *EEOC v. Global Horizons, Inc.*, 915 F.3d 631 (9th Cir. 2019).
392 *EEOC v. Global Horizons, Inc.*, 2020 U.S. Dist. LEXIS 48836, at **78-80 (E.D. Wash. Mar. 20, 2020).

Global provided the terms and conditions of employment that the Claimants were entitled to receive."[393] The court rejected this argument due to insufficient evidence that the Growers retained power to control Global's treatment of the workers, explaining: "Even if a joint employment relationship exists, an employer may be liable for its co-employer's discriminatory conduct 'only if the defendant employer knew or should have known about the other employer's conduct and failed to undertake prompt corrective measures within its control.'"[394]

Similarly, a court in the Southern District of Indiana granted summary judgment in favor of an employer and rejected claims of joint employer status.[395] The EEOC alleged the defendants discriminated against Black employees who worked for Hamilton Pointe (an LLC operating a long-term care facility). Another entity (TLC) provided management consulting and outsourcing solutions to clients like Hamilton Pointe. The EEOC argued in part that TLC had sufficient control over the employees to be considered a "joint employer."[396] The court applied the five-factor test used in the Seventh Circuit, which considers: (1) the extent of the [purported] employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.[397] Based on these factors, the court found the EEOC failed to raise a genuine issue of material fact on whether TLC is a joint employer. TLC did not have authority to hire, fire, or discipline the employees; it did not control their scheduling or assignments; and the employees were never were on TLC's payroll.[398]

5. EEOC Motions, Challenges to Affirmative Defenses

Two cases from early 2020 illustrate a departure from the well-recognized rule that courts disfavor motions to strike affirmative defenses. In a decision out of the U.S. District Court for the Western District of New York, the court granted the EEOC's motion to strike three affirmative defenses.[399] The court rejected defendant's second affirmative defense alleging that the only parties entitled to bring claims are those identified during the EEOC's investigation and whose claims occurred within 300 days of the filing of the charge.[400] Citing conflicting authority regarding whether the EEOC can recover for Title VII violations arising more than 300 days prior to the filing of a charge, the court followed district precedent and granted the EEOC's motion to strike defendant's second affirmative defense.[401] With respect to the defendant's twelfth and fourteenth affirmative defenses relating to the EEOC's alleged failure to engage in good-faith conciliation, the court found that the motion to strike should be granted because the EEOC alleged compliance with its conciliation obligations and the defendant responded to those allegations, therefore the affirmative defenses were redundant.[402]

In Florida, the EEOC sought to strike the following affirmative defenses: (12) "a laundry list of equitable defenses without any factual support;" (19) failure to meet jurisdictional prerequisites; (18) failure to satisfy statutory obligation to conciliate the charge; (20) failure to exhaust administrative remedies; and (17) a "combination and duplication of the 18th and 20th affirmative defenses."[403] Agreeing with the magistrate's conclusions and recommendations, the court granted the EEOC's motion to strike, holding that the 12th affirmative defense included equitable defenses which were simply conclusory, the 19th affirmative defense did not meet the requirements of Fed. R. Civ. P. 9(c), the 18th affirmative defense was moot because conciliation is a prerequisite to filing suit, and the 20th affirmative defense failed because the EEOC is not limited to claims presented by the charging parties.[404]

In another Florida case decided several months later, however, the court denied the EEOC's motion to strike similar affirmative defenses, including lack of standing to sue due to the EEOC's failure to conciliate, statute of limitations, failure to exhaust administrative remedies, and failure to state a claim.[405] The magistrate noted that the failure to conciliate

393 *Id.* at **78-79.
394 *Id.* at **79-80 (E.D. Wash. Mar. 20, 2020) (*quoting EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 641 (9th Cir. 2019)) (internal quotations and citations omitted).
395 *EEOC v. Vill. at Hamilton Pointe LLC*, 2020 U.S. Dist. LEXIS 55870 (S.D. Ind. Mar. 31, 2020).
396 *Id.* at *8 (S.D. Ind. Mar. 31, 2020).
397 *Id.* at **8-9 (S.D. Ind. Mar. 31, 2020) (*citing Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991)).
398 2020 U.S. Dist. LEXIS 55870, at **14-15.
399 *EEOC v. Protocol of Amherst, Inc.*, 2020 U.S. Dist. LEXIS 45982, at *1 (W.D.N.Y. Mar. 16, 2020).
400 *Id.*
401 *Id.*
402 *Id.* at **1-2.
403 *United States EEOC v. O'Reilly Auto. Stores, Inc.*, 2020 U.S. Dist. LEXIS 30979, at **1-2 (M.D. Fla. Feb. 24, 2020).
404 *Id.* at **2-4.
405 *EEOC v. Univ. of Miami*, 2020 U.S. Dist. LEXIS 91813, at *1 (S.D. Fla. May 22, 2020).

affirmative defense was a type of denial and its viability should be decided on summary judgment or a motion to stay pending conciliation.[406] Likewise, the magistrate recommended treating the failure to state a claim affirmative defense as a denial.[407] Defendant's time-bar affirmative defense referred to the 300-day period as a statute of limitations, thus the magistrate explained that the EEOC was responsible for proving the continuing violation doctrine or equitable tolling applied.[408] Finally, the EEOC's attempt to strike the exhaustion defense failed because defendant properly challenged the EEOC's application of the continuing violation doctrine.[409]

6. Venue

Defendants seeking to transfer venue often benefit from the principle that venue may be proper in multiple judicial districts. In New Mexico, after weighing the venue transfer factors, the district court decided to transfer a case to the Western District of Texas.[410] Reiterating Title VII's venue provision that "actions may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed," the court rejected defendants' argument that venue was proper in the Western District of Texas simply because the alleged unlawful employment practices substantially occurred there. The court then analyzed the following factors to decide the motion to transfer: "(1) the plaintiff's choice of forum; (2) the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; (3) the cost of making the necessary proof; (4) questions as to the enforceability of a judgment if one is obtained; (5) relative advantages and obstacles to a fair trial; (6) difficulties that may arise from congested dockets; (7) the possibility of the existence of questions arising in the area of conflict of laws; (8) the advantage of having a local court determine questions of local law; and (9) all other considerations of a practical nature that make a trial easy, expeditious and economical."[411]

There was no dispute that the case could have been brought in the Western District of Texas.[412] Noting that "unless the balance is strongly in the moving party's favor, the plaintiff's choice of forum should rarely be disturbed," the court explained that the first factor weighed against transfer because the plaintiff's charge was filed with Albuquerque's EEOC office, and there was "uncontradicted evidence showing that some of defendants' unlawful employment practices occurred in the District of New Mexico."[413] The court then turned to the "most important factor," the convenience of the witnesses, indicating this factor weighed in favor of transfer because two material witnesses were located outside the District of New Mexico's subpoena power, but inside the Western District of Texas, and based on defendants' explanation, it was reasonable to presume that the two witnesses had little incentive to appear for the trial voluntarily.[414] The court explained that the third and sixth factors weighed in favor of transfer because travel costs to the Western District of Texas were less compared to Albuquerque, and New Mexico's docket was more congested.[415] Because the parties agreed that the remaining factors were not dispositive, the court did not address them.[416] Despite the plaintiff's choice of forum weighing against transfer, the court held that the other factors, when taken together, weighed strongly in favor of transferring the case.[417]

B. Statute of Limitations and Equitable Defenses for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action.[418] Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.

There has yet to be a court of appeals decision determining whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative

406 *Id.* at *9.
407 *Id.* at *18.
408 *Id.* at **12-15.
409 *Id.* at *16.
410 *EEOC v. Plains Pipeline, L.P.*, 2020 U.S. District LEXIS 52863, at *2 (D.N.M. Mar. 25, 2020).
411 *Id.* at *5.
412 *Id.* at *6.
413 *Id.* at **6-7.
414 *Id.* at **10-11.
415 *Id.* at **11-13.
416 *Id.* at *13.
417 *Id.* at *14.
418 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the charge-filing requirement is 180 days.

charge. The EEOC has often argued that individuals whose claims of alleged harm occurred more than 300 days before the filing of the charge could still be eligible to participate in a pattern-or-practice lawsuit.

In 2018, a district court held that held that alleged victims of pattern-or-practice discrimination are not bound to file timely claims within 300 days of discriminatory conduct under Title VII or the ADA, "so long as the additional discriminatory practices, or victims, have been ascertained in the course of a reasonable investigation of the charging party's complaint and the EEOC has provided adequate notice to the defendant-employer of the nature of such charges to allow resolution of the charges through conciliation."[419] The court also agreed with the EEOC's contention that ADEA actions "are indisputably not subject to the 300-day charge-filing period applicable to private actions."[420]

A handful of other district courts in recent years have similarly held that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day limitations period.[421] For example, in *EEOC v. New Prime*, a district court in Missouri observed that a "few" district courts have applied the 300-day period to pattern-or-practice cases, but then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[422] In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 Illinois district court case that held, "[a]fter careful consideration, this Court has concluded that the limitations period applicable to Section 706 actions does not apply to Section 707 cases, despite the language of Section 707(e), which mandates adherence to the other procedural requirements of Section 706."[423] The *Mitsubishi* court noted that, when the EEOC files a pattern-or-practice charge, it is usually unable to articulate any specific acts of discrimination until the investigation begins. Therefore, it would be impossible to determine at that point if the charge was timely filed within 300 days of the discriminatory conduct and it would be arbitrary to bar liability for all conduct occurring more than 300 days before the filing of the charge.[424] Acknowledging that such an interpretation would leave pattern-or-practice claims without a limitations period and "might place an impossible burden on defendants in other cases to preserve stale evidence," the *Mitsubishi* court proposed allowing the "evidence [of discrimination to] determine when the provable pattern or practice began."[425]

As another recent example in pattern-or-practice cases, a later district court decision in *EEOC v. Staffing Solutions of WNY, Inc.* upheld the magistrate judge's report and recommendation in declining to limit the EEOC to seek redress for only those claims that occurred within 300 days prior to the filing of the charge.[426] The *Staffing Solutions* court went further in agreeing that the EEOC is not subject to the 300-day charge-filing period for ADEA claims.[427] However, other courts have disagreed, finding that the statute's plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC's charge.[428]

If a 300-day limitations period is applied, generally, it is triggered by the filing of a charge. (The court will count back 300 days from the date of filing of the charge and require that the discriminatory act occur within that timeframe to be actionable.)[429] If the discriminatory act is a termination, the "date of the termination" is considered to be the date the employer gives the employee unequivocal notice of the termination.[430] An employer should assert the statute of limitations defense as

419 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, at *4 (W.D.N.Y. Dec. 6, 2018), *citing EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 WL 5312645, at *3 (W.D.N.Y. 2018).

420 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186, at *5.

421 *EEOC v. New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014); *see also EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at **8-9, fn. 4 (D. Md. Oct. 15, 2013) (refusing to apply 300-day period to pattern-or-practice case).

422 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34.

423 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1085 (C.D. Ill. 1998).

424 *Id.* at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

425 *Id.* at 1087.

426 *EEOC v. Staffing Solutions of WNY, Inc.*, 2020 U.S. Dist. LEXIS 40474, at *3 (W.D.N.Y. Dec. 6, 2018) (*citing EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 U.S. Dist. LEXIS 183904, 2018 WL 5312645, at *4 (W.D.N.Y. Oct. 26, 2018); *EEOC v. Sterling Jewelers, Inc.*, 2010 U.S. Dist. LEXIS 649, 2010 WL 86376, at *5 (W.D.N.Y. Jan, 6, 2010)).

427 *Id.*

428 *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 547 (W.D. Va. 2001) (while limitations period is not particularly well-adapted to pattern-or-practice cases, problems are not insurmountable); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093 (D. Haw. Nov. 8, 2012) (court will not disregard the statute's text or ignore its plain meaning in order to accommodate policy concerns); *see also EEOC v. FAPS*, 2014 U.S. Dist. LEXIS 136006, at *69 (D.N.J. Sept. 26, 2014) ("Like the majority of the courts that have reviewed this issue, the Court is convinced that Section 706 applies to claims brought by the EEOC"); *EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at **13-16 (W.D. Pa. July 23, 2012) (noting lack of circuit court decisions on point and citing cases evidencing the split of authority in federal district courts); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012) ("spate" of recent decisions applying 300-day limitations period).

429 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 (D. Md. Aug. 4, 2014).

430 *EEOC v. Orion Energy Sys. Inc.*, 145 F.Supp.3d 841, 845-46 (E.D. Wis. Nov. 12, 2015) (date plaintiff overheard employer planned to terminate her employment was not unequivocal notice of final termination decision).

soon as it has knowledge of facts suggesting that the discriminatory act occurred outside the 300-day window.[431] In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts will be encompassed in the lawsuit.[432]

Some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.[433] This is helpful to employers because it shortens the period during which the EEOC can reach back to draw in additional claimants.

In *Arizona ex rel. Horne v. Geo Group, Inc.*, however, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[434] The Ninth Circuit observed that the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[435]

Given the district courts' trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving age discrimination under the ADEA, the EEOC can attempt to avoid Section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[436] In such a case, the Commission claims its authority to bring a pattern or practice case derives from the ADEA's 29 U.S.C. § 626(b), which adopts "the powers, remedies, and procedures provided in" the Fair Labor Standards Act.[437]

In *EEOC v. New Mexico*, the district court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[438] The court granted summary judgment to the EEOC on the employer's statute of limitations defense because the court found that Title VII's 300-day deadline did not apply to EEOC enforcement actions under the ADEA.[439]

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the continuing violation doctrine—which allows a timely claim to be expanded to reach additional violations outside the 300-day period—and the single-filing rule, which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and similar conduct as a timely filed claim.[440] In FY 2018, one district court conceded the application of the continuing violation doctrine in pattern-or-practices cases was a "close call" but ultimately was bound by Tenth Circuit precedent to apply the doctrine.[441] The court

431 *Id.* at 844 (employer lacked diligence by waiting to assert statute of limitations defense where employee had disclosed her knowledge of the alleged discriminatory act, as well as the date she gained that knowledge, during her termination meeting).
432 *EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).
433 *EEOC v. Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012).
434 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).
435 *Id.*
436 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at **14-15, n. 9 (D.N.M. Mar. 27, 2018) ("no statute of limitations on EEOC enforcement actions under the ADEA").
437 29 U.S.C. § 201, *et seq.; EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018), at *26 (explaining but not deciding the EEOC's argument it could pursue a pattern or practice age discrimination claim without resort to Title VII).
438 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at *6 (D.N.M. Mar. 27, 2018) ("pattern or practice" not specifically alleged but the EEOC brought a representative action on behalf of "aggrieved" individuals).
439 *Id.* at **14-15 (D.N.M. Mar. 27, 2018).
440 *EEOC v. Draper Development LLC*, 2018 U.S. Dist. LEXIS 115124, at **9-10 (N.D.N.Y. July 11, 2018) (adopting flexible approach and excusing charging party's failure to verify charge where employer not prejudiced); *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server's claims against the harasser's coworker permitted where another server had timely filed a charge of discrimination against the main harasser and where the EEOC had given notice that the harassing behavior was not limited to one person); *Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *10 (D.N.J. Oct. 18, 2012) (where the employer's conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093, n. 5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.*, 872 F.Supp.2d 1107, 1112 (E.D. Wash. 2012); *EEOC v. Pitre, Inc.*, 908 F.Supp.2d 1165, 1175 (D.N.M. Nov. 30, 2012).
441 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *21, following *Bruno v. W. Elec. Co.*, 829 F.2d 957, 960 (10th Cir. 1987).

further found the EEOC sufficiently alleged the continuing violations theory, denying the employer's motion to dismiss untimely disability discrimination-in-hiring claims.[442]

The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[443] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing his or her claim.[444] Termination, failure to promote, and denial of overtime are all examples of discrete actions that are only reachable if within the 300-day limitation, even if they occur as part of a hostile work environment.[445]

The EEOC is not always successful in arguing the continuing violation doctrine should apply to pattern-or-practice cases. In FY 2017, the court in *EEOC v. Discovering Hidden Hawaii Tours, Inc*. stated:

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[446]

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on *Discovering Hawaii* and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the 300-day window.[447] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[448] In FY 2018, one district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether the EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[449] On the other hand, in FY 2017, a federal district court in California held that a defendant *may not* bring a laches defense in an enforcement action brought by the United States unless the defendant can show affirmative misconduct on the part of the government.[450]

In a more recent decision, a district judge issued a ruling in favor of the EEOC in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment.[451] The EEOC brought suit against alleged joint employers on behalf of nine former employees and other aggrieved individuals, complaining of discrimination, retaliation, and harassment on the basis of race, sex, color, and/or national origin.[452] (Seven of the individuals joined as intervenors as well.) In their motion to dismiss, defendants argued that the Title VII claims must be limited to acts occurring on or after February 10, 2009, which marked 300 days prior to the filing of a discrimination charge by the initial claimant.[453] In response, the EEOC and intervening plaintiffs pointed out that conduct predating the 300-day period may be considered by a fact-finder as part and parcel of a hostile work environment claim, and as "'background evidence' of discriminatory intent."[454] The court noted that the U.S. Supreme Court had not expressly

442 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *23; see also, *EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **5-6 (D. Minn. Aug. 27, 2014) (300-day limit does not apply to pattern-or-practice cases where a "continuing violation" is alleged); see also, *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at **50-51 (D. Md. Apr. 17, 2018) (court denied summary judgment based on timeliness in multi-plaintiff hostile work environment case where EEOC claimed continuing violations defense).

443 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51 (D. Md. Apr. 17, 2018).

444 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 115 (2002) ("each discrete discriminatory act starts a new clock for filing charges alleging that act").

445 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51.

446 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).

447 *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1033-34 (D. Ariz. Jan. 7, 2013); see also *Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *8 (holding that some individual claims were barred even under the continuing violation doctrine because the alleged unlawful acts were separated by up to 6-8 years).

448 *EEOC v. Baltimore Cty.*, 202 F.Supp.3d 499, 522 (D. Md. 2016).

449 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, at **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).

450 *EEOC v. Marquez Brothers International Inc.*, 2017 U.S. Dist. LEXIS 153339, at *23 (E.D. Cal. Sept. 18, 2017).

451 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).

452 *Id.* at **2-15.

453 *Id.* at *16.

454 *Id.* at *18.

decided the question of "whether discrete acts of discrimination falling outside the 300-day window may be considered in conjunction with a hostile work environment claim."[455] Nonetheless, the court ultimately agreed with the plaintiffs and declined to adopt a rule "categorically barring the use of discrete acts to support a hostile work environment claim."[456] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[457]

Defendants also challenged claims asserted on behalf of two individuals who did not file discrimination charges with the EEOC. Defendants contended that the EEOC neglected to exhaust administrative remedies with respect to these two non-charging parties, necessitating dismissal.[458] The court rejected that theory, however, because the EEOC brought those claims through an enforcement action, which does not require administrative exhaustion.[459] And while the defendants argued in their reply brief that the EEOC had failed to satisfy other pre-suit conditions (such as notice and conciliation), the court refused to entertain that argument because it was not properly raised.[460]

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims are outside the 300-day window based on the continuing violations doctrine and, before district courts at least, an even stronger argument that the statute of limitations set forth in Section 706 must be applied to Section 707 claims.

C. Intervention and Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their administrative remedies, allowing intervention by individuals who have previously stipulated to dismissal of claims, allowing intervention by an individual whose claims were subject to mandatory arbitration, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[461]

1. EEOC Permissive Intervention in Private Litigation

As the primary federal agency charged with enforcing antidiscrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits—even in instances in which the EEOC has previously investigated the matter at issue and decided not to initiate litigation. Private discrimination class actions are more common targets for EEOC intervention. Given the agency's resource allocation concerns, however, there may be a natural reticence to intervene in private actions unless the agency seeks to raise issues or arguments that the private plaintiffs may not be pursuing or emphasizing.

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[462] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[463] The same approach is followed in dealing with intervention in ADA actions.[464]

Federal Rule of Civil Procedure 24(b) generally addresses "permissive intervention" in civil cases, and provides that anyone may intervene who "(A) is given a conditional right to intervene by a federal statute [such as Title VII's grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or

455 *Id.*
456 *Id.* at **22-25.
457 *Id.* at **25-27.
458 *Id.* at *28.
459 *Id.* at *29.
460 *Id.* at **30-31.
461 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, *et al.*, *Annual Report on EEOC Developments: Fiscal Year 2013*.
462 42 U.S.C. § 2000e-5(f)(1).
463 *See Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at *6, n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).
464 42 U.S.C. § 12117.

fact."[465] Rule 24(b) instructs courts to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights in determining whether to grant motions to intervene.[466]

In determining whether to exercise their discretion and permit intervention by the EEOC under Rule 24(b), courts consider:

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[467]

2. A Charging Party's Right to Intervene in EEOC Litigation

A charging party may want to intervene in a lawsuit filed by the EEOC to preserve their opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC's and the charging party's interests diverge.

Title VII and the ADA expressly permit a charging party to intervene in an action brought by the EEOC against the charging party's employer.[468] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence their own lawsuit terminates.[469]

With respect to intervention in a Title VII or ADA lawsuit filed by the EEOC, Rule 24 sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene. Under Rule 24, intervention is either *a matter of right* (Rule 24(a)) or permissive (Rule 24(b), discussed above).

Rule 24(a) provides:

(a) Intervention of Right. On timely motion,[470] the court must[471] permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). While courts construe Rule 24 liberally in favor of potential intervenors, an applicant for intervention bears the burden of showing that they are entitled to intervene.[472] A minor overlap between the impetus for the EEOC's case and a proposed intervenor's allegations are insignificant where the facts constituting the proposed intervenor's allegations and their requested relief are substantively different from the aggrieved's claims and requested relief.[473] If pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[474] Rule 24(b) may also apply if the movant is not aggrieved

465 FED. R. CIV. P. 24(b) (as amended Dec. 1, 2007).

466 *Id.*

467 *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975); *see also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exits; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties." *See also EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018) (denying intervention because plaintiff-intervenors failed to comply with pleading requirements under Rule 24(c) and finding untimeliness when plaintiff-intervenors sought to intervene five months after judgment was entered thereby prejudicing the parties).

468 *See* 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

469 *See* 29 U.S.C. § 626(c)(1); *see also EEOC v. SVT, LLC,* 297 F.R.D. 336, 341 (N.D. Ind. Jan. 8, 2014) (explaining the differences between Title VII and the ADEA and specifically noting that the right of any person to bring suit under the ADEA is terminated when suit is brought by the EEOC); *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 149897, at **4-5 (S.D. Fla. Nov. 3, 2015) (holding the proposed plaintiffs-intervenors "have no conditional or unconditional right to intervene in the ADEA action because the ADEA expressly eliminates such a right upon the EEOC's filing of an action on a person's behalf").

470 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187 (S.D. Cal. Aug. 31, 2017) (citing *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) ("Mere lapse of time is not determinative")) and *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620 (W.D. Okla. Nov. 16, 2016) ("When determining timeliness for purposes of intervention...[t]he analysis is contextual; absolute measures of timeliness should be ignored.") (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)); *But see U.S. EEOC v. JC Wings Enters., L.L.C.*, 2019 U.S. App. LEXIS 26465 (5th Cir. 2019) (denying intervention for failure to file motion to intervene within ninety-day prescription period mandated by ADEA).

471 *See EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019) (finding error in district court's failure to consider and rule on the merits of the motion to intervene because plaintiff had an unconditional statutory right to intervene).

472 *EEOC v. Herb Hallman Chevrolet*, 2020 U.S. Dist. LEXIS 16743 at *3 (D. Nev. Feb. 3, 2020).

473 *Id.* at *9.

474 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).

by the practices challenged in the EEOC's lawsuit[475] or the movant is a governmental entity other than the EEOC.[476] Note, however, that some courts have allowed intervention solely on the basis that a motion to intervene is uncontested,[477] but will deny intervention under a traditional Rule 24(a) analysis. For example, in *EEOC v. 1618 Concepts Inc.*,[478] the court denied intervention on the remaining claims of breach of contract and constructive discharge in violation of public policy because the plaintiff failed to show that he had an interest in the subject matter of the action.

A plaintiff-intervenor's Title VII complaint is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[479] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[480] Courts will also permit intervention even when the individual's complaint includes claims that are legally barred, reasoning that these claims may be used to support a claim that is timely.[481]

Courts are permissive in granting individuals' requests to intervene in lawsuits brought by the EEOC regardless of whether the proposed intervenors failed to exhaust their administrative remedies.

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[482] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against Black employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court declined to hold the individuals were "persons aggrieved" or entitled to application of the "single-filing rule." The court, however, dismissed the claims of intervenors that arose long before the lone charging party's claims, holding that the charging party's charge could not possibly have put the company on notice of these individuals' older claims.

One court has also applied the "single filing rule" to a charging party-plaintiff who failed to timely file her EEOC charge. In *United States EEOC v. JCFB, Inc.*,[483] the charging party-plaintiff filed almost a year after the statutory period for filing a charge for discrimination ended. However, in rejecting defendant's attempts to distinguishing plaintiffs' claims, the court exempted the plaintiff from the administrative requirement to timely file and found that the timely filed plaintiff's claims were identical to the late-filed plaintiff's claims.

In *EEOC v. J & R Baker Farms, LLC*,[484] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled that potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[485] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired

475 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).
476 *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 33346 (D. Haw. Mar. 13, 2012) (granting motion to intervene filed by the U.S. Government (Department of Justice) under Rule 24(b)).
477 *EEOC v. 1618 Concepts Inc.*, 2020 U.S. Dist. LEXIS 2090, at **20-22 (M.D.N.C. Jan. 7, 2020); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2020 U.S. Dist. LEXIS 174176 (E.D. Mich. Sept. 23, 2020).
478 2020 U.S. Dist. LEXIS 2090, at **22-22.
479 *EEOC v. Denton Cty.*, 2017 U.S Dist. LEXIS 202499 (E.D. Tex. Dec. 8, 2017).
480 *Id.* at *5.
481 *Id.* at *6.
482 *EEOC v. Stone Pony Pizza, Inc.*, 172 F.Supp.3d 941 (N.D. Miss. 2016).
483 *United States EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. June 19, 2019).
484 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
485 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).

and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor failing to state that he sought to represent others on his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

A mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[486] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review, and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b) as discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[487]

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[488] A recent court decision in *EEOC v. Norval Electric Cooperative, Inc.*,[489] however, held that in order for the court to hear an intervenor's state law claims, the intervenor must seek leave from the court to file an amended complaint that contains both her federal and state law claims, reasoning that the court lacked authority to remove or consolidate a state court action to federal court. Further, the court also declined to exercise supplemental jurisdiction over the intervenor seeking judicial review of proceedings before the state Human Rights Commission, reasoning there was nothing to be gained in terms of judicial economy or avoidance of risk of conflicting decisions.[490]

In *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[491] the court allowed the plaintiff-intervenor to assert her state law claims for assault, battery, intentional and negligent infliction of emotional distress, negligent hiring, supervision, training, and retention, and wrongful discharge because the factual bases for these claims and the Title VII gender discrimination and sexual harassment claims were closely related, and it would not require a lengthy extension of the case deadlines. Likewise, in *EEOC v. Favorite Farms*,[492] the plaintiff-intervenor survived a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

In contrast, in *EEOC v. Norval Electric Cooperative, Inc.*,[493] a Montana district court held that while it could exercise pendent jurisdiction over an intervenor's state law claims that arise from the same nucleus of facts as the federal claims, in order for the court to hear those state law claims, the intervenor must ask the court for leave to file an amended complaint that contains both her federal and state law claims.

Note that in *EEOC v. LXL Learning, Inc.*,[494] the court permitted intervention even though the parties had stipulated to dismissal of a prior lawsuit with prejudice. After the dismissal and after the EEOC had initiated its own lawsuit, the plaintiff-

486 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
487 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
488 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017).
489 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at ** 10-11 (D. Mont. Apr. 2, 2020).
490 *Id.* at *7.
491 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
492 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).
493 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).
494 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).

intervenor sought to intervene on the Title VII claim (which the employer did not oppose based on the prior agreement) under a different factual theory. The intervenor also sought to add a state law claim previously not asserted. The employer opposed such additions on the basis that the stipulated dismissal barred the plaintiff-intervenor from any claims or theories in the case beyond what the EEOC had included in its complaint. However, while the court agreed that the employer did not consent to expand the case, the court conditionally permitted intervention with the understanding that the employer may further pursue its *res judicata* defense.

4. Individual Intervenor Claims Alongside EEOC Pattern-or-Practice Claims

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[495] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes.

In *EEOC v. JBS USA, LLC*,[496] the EEOC sued a meatpacking company—alleging it discriminated against Somali, Muslim, and Black employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 intervenor-plaintiffs sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also intervenor-plaintiffs.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[497]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted only the Third Circuit has so held.[498] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given that multiple employees filed charges alleging similar discriminatory treatment on the same day.

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[499] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay.

In *EEOC v. Faurecia Auto Seating, LLC*,[500] two plaintiffs with separate lawsuits sought to consolidate their cases with an EEOC lawsuit filed on behalf of 15 claimants. Both plaintiffs alleged ADA discrimination by the same employer and the EEOC did not oppose consolidation. The court denied consolidation, however, given that a significant amount of discovery had already been conducted, including 29 depositions. Thus, the court noted that seeking to add the additional parties would require all 29 deponents to be re-deposed and would expand the scope and extend the time of discovery. The court

495 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
496 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
497 *EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
498 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).
499 Fed. R. Civ. P. 42.
500 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).

further noted consolidation would also result in a significant risk of prejudice to the employer and increase litigation costs for the parties.

D. Class Issues in EEOC Litigation—ADEA Litigation

When the EEOC files suit under the Age Discrimination in Employment Act seeking relief on behalf of employees, it looks to Section 16(c) of the Fair Labor Standards Act (FLSA) for the procedures it must follow. In FY 2020, a Maryland district court held that the EEOC was not required to adhere to the "opt-in" procedural requirements associated with collective actions under Section 16(b) of the FLSA, because the "ADEA's statutory scheme [including legislative history] plainly permits the EEOC to pursue an enforcement action under its provisions without obtaining the consent of the employees it seeks to benefit."[501] The EEOC, therefore, could seek relief on behalf of a class under the ADEA without obtaining the consent of employees.

E. Other Critical Issues in EEOC Litigation

1. Protective Orders

While a protective order commonly governs discovery in most employment law cases, protective orders may also be used to assist in settlement discussions. In one FY 2019 case,[502] a magistrate judge held a pre-discovery settlement conference with the parties in which she suggested that disclosure of certain confidential financial information and documents might be beneficial for the settlement process.[503] Although discovery had not yet commenced, the parties agreed to be bound by a protective order for the limited purpose of engaging in settlement discussions with the magistrate judge.[504]

The public generally has a right to judicial records. A party seeking to limit public access to such records has the burden to show that sealing is appropriate and must support its position with specific reasons. In a disability discrimination case,[505] a federal court in North Carolina granted, in part, the parties' request to seal certain personal and private medical information of a kind not ordinarily made public, holding that privacy interests override the public's interest in access to such records. The court sealed personal and medical information of limited or no relevance to the case, such as claimant's medical records concerning irrelevant health conditions. The court also granted defendant's request to seal deposition transcripts and OSHA records that contained health information of employees not parties or claimants on the grounds that this information was not relevant. The court declined, however, to seal information about the nature of injuries suffered by employees because it was relevant to the court's decision. The court also denied the parties' requests to seal other types of information. For example, the court disagreed that the name of the claimant's prescription drug at issue in her discharge and the results of a drug test were otherwise sensitive information. The court also refused to seal information concerning dates of treatment and diagnoses because these were relevant to the court's summary judgment decision in the case. A table listing prescriptions employees disclosed per company's drug disclosure policy, but which did not contain personally identifiable detail, also was not confidential.

2. ESI: Electronic Discovery-Related Issues

The discovery process, particularly when electronically stored information (ESI) is involved, should be collaborative. In a case involving ADEA claims,[506] a federal court in Florida addressed issues concerning "self-collection" during discovery. In that case, the EEOC sought, among other things, inspection of defendant's ESI, alleging that because the defendant self-collected responsive docs without oversight of counsel, it did not comply with its obligations under FRCP 26(a)(1) and (a)(3).

The court agreed, and noted that applicable rules and case law establish that an attorney has a duty and obligation to have knowledge of, and supervise or counsel the client's discovery search, collection and production. An attorney cannot abandon their professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to "self-collect" discovery without any attorney advice, supervision or knowledge of the process utilized.

The court found that "[d]efendant's counsel seemingly failed to properly supervise his client's ESI collection process, but then he signed off on the completeness and correctness of his client's discovery responses." An attorney's signature is "not a mere formality." Rather, the court noted, "it is a representation to the Court that the discovery is complete and correct at the

501 *EEOC v. Baltimore Cty.*, No. CV RDB-07-2500, 2019 U.S. Dist. LEXIS 185913, 2019 WL 5555676 (D. Md. Oct. 28, 2019).
502 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
503 *Id.* at **1-2.
504 *Id.*
505 *EEOC v. Loflin Fabrication LLC*, 2020 U.S. Dist. LEXIS 119252, 2020 WL 3845020 (M.D.N.C. July 8, 2020).
506 *EEOC v. M1 5100 Corp.*, 2020 U.S. Dist. LEXIS 117243, 2020 WL 3581372 (S.D. Fla. July 2, 2020).

time it is made." The court found that defendant and defendant's counsel did not employ the proper practices in responding to plaintiff's discovery requests, but given that discovery was not yet completed, the court gave defendant one last chance to complete discovery and meet its collection and production obligations. The court withheld its ruling on non-compliance until after further opportunity to comply.

3. Reliance on Experts, Including in Systemic Cases

Expert testimony remains a frequent topic of motion practice in EEOC cases. In March 2020, a federal court in Maryland found reports and testimony from experts from both sides to be relevant and denied the parties' motions to exclude them.[507] In that case, the EEOC alleged that a food distribution company engaged in a pattern or practice of gender discrimination in hiring for certain positions at its distribution centers. Defendant moved to exclude the EEOC's expert reports and testimony, and the EEOC moved to exclude the testimony and reports of the defendant's rebuttal expert. Applying *Daubert*, the court analyzed the experts' reports and testimony and found them to be relevant and reliable.

In analyzing the motion to exclude the EEOC's expert's report and testimony, the court stated that, even if defendant's rebuttal expert's criticism was valid, it did not require exclusion of the EEOC's expert testimony and reports because she used accepted statistical methods and whether a different statistical analysis is more appropriate would be a question of fact for the jury. The court also stated that defendant can address other criticisms as to methodology on cross-examination, concluding that the criticism of the EEOC's expert report and testimony, even if valid, did not reflect on the ultimate question.

As to the EEOC's motion to exclude the rebuttal expert reports and testimony, the court denied it, holding that standards of relevance and reliability were met and that it would be helpful for the jury to hear about limitations on the EEOC's expert witness methodology. Further, the rebuttal witness sufficiently explained his criticisms to be reliable, including that his methodology was clearly noted in his report.

4. Management of Class Discovery

A recent decision demonstrates the types of evidence that may be in dispute in class action or pattern-or-practice claims in the summary judgment context.[508] In a Maryland federal district court decision, the court granted in part defendant's motion to strike certain testimony and exhibits presented by the EEOC as part of its motion for summary judgment.

In that case, the EEOC alleged that a food distribution company engaged in a pattern or practice of gender discrimination in the selection of certain positions. In support of its motion for summary judgment, the EEOC presented declarations and testimony from non-designated witnesses, six arguably hearsay statements, and documents from EEOC investigative files.

Specifically, the EEOC attached as exhibits declarations from 36 non-designated class members. Defendant sought to exclude these declarations as inadmissible based on the final pretrial order. The EEOC argued that the court should modify its order to prevent manifest injustice, but the court disagreed, saying the prejudice to defendant would be great because it did not have the opportunity to depose these individuals. The court struck as inadmissible hearsay letters to the EEOC which the EEOC included in supporting exhibits because the authors of the letters did not adopt them in their depositions. The court also struck the complaint and summary judgment opinion from a separate lawsuit, noting that it is "not appropriate to use factual statements in that memorandum opinion to determine facts in this case, especially as to the EEOC's motion for summary judgment...." Defendant also sought to exclude certain hearsay statements, but the court rejected this request after finding the statements not to be hearsay.

For the statements and exhibits the court did not strike, it only decided that they were admissible for purposes of the summary judgment motions, not that they would be admissible at trial.

F. General Discovery By Employer—Third-Party Subpoenas

In *EEOC v. Dolgencorp, LLC*,[509] the court granted the EEOC's motion for a protective order and an order to quash a subpoena to a third-party employer. In that case, the EEOC filed suit against the defendant on the grounds that it created a sexually hostile work environment and constructively discharged the charging party. Based on information received during charging party's deposition, the employer sent a subpoena to her prior employer, requesting "[a]ny and all records maintained in the ordinary course of business with respect to [charging party]...including but not limited to [her] personnel file, disciplinary

507 *EEOC v. Performance Food Grp., Inc.*, 2020 U.S. Dist. LEXIS 46974 (D. Md. Mar. 18, 2020).
508 *EEOC v. Performance Food Grp., Inc.*, No. CV 13-1712, 2020 U.S. Dist. LEXIS 46971, 2020 WL 1287974 (D. Md. Mar. 18, 2020).
509 2019 U.S. Dist. LEXIS 220340 (Dec. 23, 2019).

records, and any complaint or investigation records." EEOC moved to quash the subpoena on grounds that the records sought were (1) disproportional, (2) irrelevant, and (3) intended to harass and embarrass charging party.

The court held that, while prior employment records may be relevant and discoverable for credibility determinations, the party seeking the records must demonstrate a legitimate, good-faith basis for the lack of credibility, and the employer in this instance did not meet that burden. The court found insufficient a secondhand assertion during a deposition that the charging party "was trouble." This unexplained allegation had no relevance to the instant action, particularly since it was uncontroverted the charging party was a good employee. The court therefore agreed that the records sought were overbroad, irrelevant and carried the potential to embarrass the charging party. "Because the subpoena is a quintessential 'fishing expedition,'" the judge granted the requested protective order and quashed the subpoena.

G. General Discovery by EEOC/Intervenor

1. Scope of Permitted Discovery by EEOC/Intervenor

A few cases decided in FY 2020 addressed the scope of information the EEOC can obtain in discovery. In one case, the defendant's failure to produce full and complete responses in a timely manner resulted in an award of attorneys' fees and costs to the EEOC.

In *EEOC v. Spencer Gifts, LLC*, involving claims of disability discrimination, the district court granted the EEOC's second motion to compel discovery, ordering the defendant to provide full and complete responses to the EEOC's interrogatories and requests for production of documents to the defendant, produce its initial Fed. R. Civ. P. 26 disclosures, provide a privilege log, and verify its interrogatory answers as required by Fed. R. Civ. P. 33(b)(5).[510] Notably, the EEOC had earlier filed a first motion to compel discovery, seeking an order compelling defendant to provide full and complete discovery responses, which the court had granted.[511] In that order, the court also directed the defendant to reimburse the EEOC for its reasonable attorney's fees and costs.[512]

Pursuant to the court order granted pursuant to EEOC's first motion to compel, the defendant provided partial discovery responses to the EEOC.[513] The defendant did not, however, provide a verification page for its interrogatory answers, lodged objections to some of the requests for production of documents based on privilege but did not provide a privilege log, and did not provide its initial disclosures, which were overdue by three months.[514] As a result, the EEOC argued the defendant's discovery was incomplete, and the court granted the EEOC's second motion to compel complete discovery responses, finding the defendant dilatory and ignoring the court's order.[515] Additionally, the EEOC sought to compel payment of fees and costs the court previously had ordered in September 2019, but that the defendant had not yet paid.[516] The court ordered the defendant reimburse the EEOC for its reasonable attorney's fees and costs and make such payment by January 3, 2020.[517]

Then, a month later, the EEOC filed its third motion to compel discovery and second motion for previously ordered attorney's fees and costs.[518] The district court granted both motions.[519] In so ruling, the court noted it "has little remaining patience for delays in this matter and/or failure to timely abide by the Court's Orders."[520] The defendant was ordered to reimburse the EEOC for its attorney's fees and costs and to provide complete discovery responses as previously ordered.[521]

In *EEOC v. East 40, Inc.*, the EEOC served requests for production of documents seeking, in part, the defendant's financial statements for the last seven years and then sought to compel their production.[522] The EEOC argued that these financial records were relevant in determining whether punitive damages were appropriate.[523] In response to the EEOC's motion to

510 *EEOC v. Spencer Gifts, LLC*, 2019 U.S. Dist. LEXIS 213373, at *8 (W.D.N.C. Dec. 10, 2019).
511 *Id.* at **5-6.
512 *Id.* at **2-3.
513 *Id.* at **5-6.
514 *Id.* at *6.
515 *Id.* at **7-8.
516 *EEOC v. Spencer Gifts, LLC*, No. 5:18-cv-00155-KDB-DCK (Order, Doc. 44) (W.D.N.C. Dec. 10, 2019).
517 2019 U.S. Dist. LEXIS 213373, at *8.
518 *EEOC v. Spencer Gifts, LLC*, 2020 U.S. Dist. LEXIS 21255, at *1 (W.D.N.C. Feb. 7, 2020).
519 *Id.*
520 *Id.* at *2.
521 *EEOC v. Spencer Gifts, LLC*, 2020 U.S. Dist. LEXIS 21255, at *2 (W.D.N.C. Feb. 7, 2020).
522 *EEOC v. East 40, Inc.*, 2020 U.S. Dist. LEXIS 54476, at *1 (D.N.D. Mar. 30, 2020).
523 *Id.* (relying on *United States v. Big D. Enters.*, 184 F.3d 924, 932 (8th Cir 1999) and *N. Dakota Fair Hous. Council, Inc. v. Allen*, 298 F. Supp. 2d 897, 899 (D.N.D. 2004)).

compel, the defendant agreed to withdraw its objections and provide the requested financial statements, so long as the records be kept confidential.[524] The district court deemed the EEOC's motion moot.[525]

In *EEOC v. George Washington University*, the district court agreed with an objection that the EEOC's discovery requests were overbroad and unduly burdensome, but narrowed the requests and ordered production of documents accordingly.[526] In that case, the EEOC alleged the charging party, who worked as an Executive Assistant to the Director of Athletics, was treated less favorably by being paid less and denied employment opportunities, as compared to her male counterpart.[527] At issue before the court were four requests for production of documents served by the EEOC seeking: (1) all work emails of the male comparator during a two-year period; (2) all work emails of the charging party during her two-year employment; (3) all work emails of the Director of Athletics during his seven-year employment; and (4) workplace complaints about the Director of Athletics without any temporal scope.[528] The defendant contended these requests were overbroad, unduly burdensome, irrelevant and would impose undue costs not proportional to the needs in the case.[529]

The EEOC argued the requests sought discoverable information about the charging party's and her supervisor's job duties, whether the charging party and her male comparator performed equal work, and whether evidence of gender bias existed.[530] In determining whether the EEOC's requests were proper, the court analyzed six factors: "the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery, and the expenses of the proposed discovery to determine whether the burden or expense outweighs the benefit of the discovery."[531] Accordingly, the court ordered the defendant produce the four documents, with the following court-imposed narrowed the scope of the requests and the following be produced: (1) all non-privileged emails from the Director of Athletics' email to the charging party or the male comparator during the time frame requested; (2) all non-privileged emails from the charging party's email to the Director of Athletics or the male comparator during the time frame requested; (3) all non-privileged email from the male comparator's email between him and third parties that reference the Director of Athletics or the charging party for a three-year period during the time when the charging party began working for the Director of Athletics until the male comparator's employment ended; (4) a "random sampling" of 10% of the remaining non-privileged emails in those three categories; and (5) non-privileged reports or complaints that the Director of Athletics subjected female employees or students to sexual harassment or sex/gender discrimination over a five-year period.[532]

In *EEOC v. M1 5100 Corp.*, a district court analyzed the permissible scope of discovery sought by the EEOC in an action alleging violations of the Age Discrimination in Employment Act and examined the obligation of an attorney to supervise discovery, including ESI.[533] The EEOC filed a motion to compel the defendant produce a privilege log, supplement its discovery responses, and allow the EEOC inspection of its ESI, plus it sought its fees and costs incurred in preparing the motion as a sanction.[534] After the EEOC filed its motion, the defendant provided supplemental discovery responses and resolved the dispute regarding the privilege log.[535] The remaining issues before the court were the EEOC's request for "better" responses, to inspect ESI and for fees.[536] Regarding the dispute over ESI, the EEOC's position was that the defendant "self-collected" documents "without the oversight of its counsel."[537] The court granted the EEOC's motion in part, ordering the defendant to supplement certain discovery responses, and reserved jurisdiction on the request a monetary sanction against the defendant.[538] Additionally, the court provided guidance to the parties regarding self-collection of ESI and ordered the parties confer on good faith on this issue.[539]

524 2020 U.S. Dist. LEXIS 54476, at **1-2.
525 *Id.* at *2.
526 *EEOC v. George Wash. Univ.*, 2020 U.S. Dist. LEXIS 112933, at *64 (D.D.C. June 26, 2020).
527 *Id.* at **1-2.
528 *Id.* at **4-5.
529 *Id.* at **2, 5.
530 *Id.* at *5.
531 *Id.* at **15-16.
532 *Id.* at **64-65.
533 *EEOC v. M1 5100 Corp.*, 2020 U.S. Dist. LEXIS 117243 (S.D. Fla. July 2, 2020).
534 *Id.* at **1-2.
535 *Id.* at *2.
536 *Id.* at **2-3.
537 *Id.* at *3.
538 *Id.* at **3, 13-14.
539 *Id.* at **3-14.

In its opinion, the court warned that "'self-collection' of discovery documents, and especially of ESI . . . without adequate knowledge, supervision, or participation by counsel, greatly troubles and concerns the Court."[540] Relying on the Federal Rules of Civil Procedure and the Sedona Principles,[541] the district court explained that "an attorney has a duty and obligation to have knowledge of, supervise, or counsel the client's discovery search, collection, and production" and "cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to 'self-collect' discovery."[542] Further, the court shared its view that defense counsel, rather than supervising the client's ESI collection process, instead simply "signed off on the completeness" of the written discovery responses.[543] Nonetheless, the court allowed the defendant a "last chance" to comply with its discovery obligation and withheld its ruling on whether the EEOC can inspect the ESI until after the parties conferred regarding appropriate ESI protocol.[544] The court declined to find bad faith on behalf of the defendant or its counsel at that time, but instead, warned both of their obligations under the relevant rules.[545]

In *EEOC v. Excel Hospitality Group, LLC*, the district court treated as unopposed, and thus granted, a charging party's two motions to compel "seeking better responses" to her first set of discovery requests.[546] The charging party, who filed an intervenor complaint, argued that the defendant "responded in a way that it is unclear whether all documents responsive to the requests have been produced," refused to produce documents supporting its defenses, and refused to provide information about issues central to the case, such as the decision not to hire the charging party and the identity of other employees holding the same position the charging party sought, but did not receive.[547] The defendant did not respond to the two motions.[548] The court found an award of sanctions in the form of reasonable fees and expenses incurred in filing the motions warranted, noting that the defendant "tacitly concedes" the motions should be granted since it had not responded to the motions in the more than a month it had to do so.[549]

2. Miscellaneous Discovery Issues

Two additional FY 2020 orders involving the EEOC's discovery efforts are also worth noting. The first involves the cancellation of an out-of-state deposition and the EEOC's motion for costs. The second involves the EEOC's attempt to review attorney-client privileged text messages.

In *EEOC v. Werner Enterprises, Inc.*,[550] the court denied in part the EEOC's request for expenses stemming from cancelled depositions. Several depositions requiring interpreters were cancelled 48 hours before they were supposed to occur because defendant's counsel was unexpectedly ill, and he was also the only attorney who had prepared for the depositions on behalf of the defendant.[551] The court declined to award attorneys' fees, but ordered the defendant to pay the EEOC's and intervenor's travel costs.[552] While the timeline of events justified the award of travel costs, the court said that awarding attorneys' fees would be unreasonable and disproportionate under the circumstances.[553] Relying on Fed. R. Civ. P. 30(g)(1), the court explained that the cancellation of the depositions occurred nearly 48 hours in advance, and was not done in bad faith.

Also notable is the order entered in *EEOC v. Bay Club Fairbanks Ranch, LLC*.[554] There, the court addressed a motion from the defendant to disqualify the EEOC's attorney who had reviewed attorney-client privileged text messages produced at a deposition in response to an EEOC subpoena.[555] The motion was based on a local rule, pertaining to compliance with standards of professional conduct.[556] The EEOC argued that the communications between the defendant's general counsel and defendant's employees regarding the investigation into sexual harassment allegations were not protected by the attorney-client privilege because they were not labeled "attorney-client communications" and were responsive to the EEOC's

540 *Id.* at *4.
541 *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, The Sedona Conference Journal, Vol. 19, No. 1 (2018).
542 2020 U.S. Dist. LEXIS 117243 at **6-7.
543 *Id.* at **7-8.
544 *Id.* at **10-11.
545 *Id.* at *12.
546 *EEOC v. Excel Hospitality Grp., LLC*, 2020 U.S. Dist. LEXIS 141106, at **1-2 (M.D. Fla. Aug. 7, 2020).
547 *Id.* at **1-5.
548 *Id.* at *1.
549 *Id.* at **5-6.
550 *EEOC v. WernerEnters., Inc.*, 2020 U.S. Dist. LEXIS 91909, at *2 (D. Neb. May 27, 2020).
551 *Id.* at **3-4.
552 *Id.* at **7-8.
553 *Id.*
554 *EEOC v. Bay Club Fairbanks Ranch, LLC*, 2020 U.S. Dist. LEXIS 129367, at *2 (S.D. Ca. Jul. 21, 2020).
555 *Id.*
556 *Id.*

subpoena.[557] The court agreed with the EEOC, explaining both that it was not obvious that the texts were privileged and that the EEOC's counsel refrained from reviewing the text messages further than necessary to discover privilege, after which the documents were sealed.[558]

H. Summary Judgment

In FY 2020, federal courts issued close to two dozen decisions addressing either the EEOC's or the various defendants' motions for summary judgment, many of which were filed as partial motions. Approximately 40% of the motions involved claims of disability discrimination under the Americans with Disabilities Act. Another 40% involved typical employment claims, including sexual harassment, race discrimination, age discrimination, and discrimination in pay and/or promotion. And this year there were even a few less-common claims addressed, including liability under a joint employer arrangement, and religious discrimination (including hairstyle discrimination, which is an emerging topic). In most instances, the courts denied either party's motion for summary judgment or partial summary judgment, though typically the motion was brought by the employer. Employers that filed partial motions for summary judgment fared better than those who sought dismissal of the entirety of the EEOC's (or charging party in intervention's) case. Some notable summary judgment decisions issued in FY 2020 are discussed below.

1. Disability Discrimination

When the EEOC alleges disability discrimination under the ADA, the EEOC must show that (1) the charging party was disabled; (2) was qualified for the job; and (3) was subjected to an adverse employment decision on account of the disability. The ADA defines a disability as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. In a handful of decisions involving disability discrimination considered this fiscal year, federal courts held that whether or not an individual has a disability as defined under the ADA was, for the most part, a matter for the jury to decide because the EEOC had put forth sufficient evidence of a disability to survive summary judgment.

In *EEOC v. Steel Painters*,[559] the EEOC sued a painting company for unlawfully firing a worker because he took methadone, at night and after work, as part of his recovery for opioid addiction. The EEOC claimed the company regarded the charging party as disabled and that he had a record of being disabled. The employer filed a motion for summary judgment, arguing (in part) that the charging party was not disabled. The charging party asserted that when he used opioids, he lost his social skills, was extremely aggressive, easily agitated, short-tempered, and volatile, and that his addiction prevented him from sleeping or eating. He also experienced extreme sickness from withdrawal when he attempted to stop using, including severe nausea, fever, and stomach pain, rendering him unable to work, eat, drink, focus, or sleep. The charging party also stated that his use of methadone ameliorated the effects of his addiction. The court determined that, based on this evidence, the EEOC had established a triable issue of fact as to whether the charging party was disabled or had a record of disability.

In *EEOC v. UPS*,[560] the EEOC claimed the employer discriminated against the charging party in violation of the ADA when, following a stroke, the charging party (a commercial truck driver) was unable to obtain a medical examiner's certificate as required by the U.S. Department of Transportation. Under the collective bargaining agreement applicable to the worksite, employees whose driving or operating privileges are revoked or suspended are granted a leave of absence, without losing seniority, for up to one year, and given alternative work opportunities if available. The charging party was told that this provision applied only to those who were unable to work because of a DUI, and not a medical condition, though he was offered a part-time position instead. Seven months later, the charging party was able to obtain a valid medical examiner's certificate and return to work as a driver. The EEOC specifically alleged that the collective bargaining agreement was discriminatorily applied to the driver.

The employer filed a motion for summary judgment arguing, among other things, that the charging party was not disabled. The EEOC cross-moved for summary judgment. The EEOC abandoned its claim that the charging party was actually disabled at the time of the adverse employment action, and instead claimed that the undisputed evidence established that the charging party either had a record of a disability or that the employer regarded him as disabled. The court determined that no reasonable

557 *Id.* at **5-8.
558 *Id.* at **9, 13.
559 *EEOC v. Steel Painters LLC*, 2020 U.S. Dist. LEXIS 18716 (E.D. Tex. Jan. 14, 2020).
560 *EEOC v. UPS Ground Freight*, 2020 U.S. Dist. LEXIS 35115 (D. Kan. Mar. 2, 2020) and *EEOC v. UPS Ground Freight*, 2020 U.S. Dist. LEXIS 73238 (D. Kan. Apr. 27, 2020).

jury could conclude the driver was not impaired following his stroke and that such impairment included a heightened risk of future strokes. In addition, the Department of Transportation's one-year waiting period indicates strokes are physical conditions that predispose a period to additional strokes. The court noted, however, that the EEOC was unable to establish as a matter of law that the charging party's stroke substantially limited his major life activities during the time he worked on the dock part time during the seven-month period after he had been denied a medical examiner's certificate following his stroke. Accordingly, the court denied both parties' motions as to whether the charging party had a record of a disability during the applicable time period.

Also, in *EEOC v. PML Services LLC*,[561] the EEOC brought suit on behalf of a housekeeper for defendant employer. The employer separated the charging party's employment for excessive absences, and the EEOC alleged the charging party had a seizure disorder and was therefore disabled, and that the employer refused to accommodate her disability by allowing her to take a couple of days off of work following a seizure. The employer moved for summary judgment, arguing, among other things, that the EEOC had failed to establish that the charging party is disabled. The charging party contended that when she suffered a seizure, she experienced limitations in concentration and physical movement, as well as mental fogginess, difficulty reading and understanding words, shaking, fatigue, stiffness, clumsiness and pain, which symptoms typically resolved in 2-5 days. The charging party was further advised by her physician to rest during this recovery party. The court denied the employer's motion, finding the EEOC had set forth enough evidence of a disability to allow a reasonable jury to make its own assessment as to whether or not the charging party was disabled.

Another notable disability-related issue that arose in FY 2020 is the extent to which communications (or lack thereof) between the employer and the charging party warrant consideration by a jury.

In *EEOC v. Cracker Barrel*,[562] the EEOC sued the employer for failing to hire an employee who is deaf. The charging party used a videophone to schedule an interview, putting the employer on notice that he was deaf. When the charging party showed up for his interview, he was kept waiting and eventually told the manager conducting the interview was not there. Despite repeated attempts, the interview was never rescheduled. The employer's internal records indicate the charging party was removed from consideration for the job, and the electronic records state: "not going to hire; reject. Do not hire. Incomplete data." The court found the issue of whether or not the charging party's disability played a role in his non-selection to be an issue of fact appropriate for jury consideration. Specifically, the court found that before the defendant knew of the candidate's hearing impairment, it offered him a chance to interview, thus acknowledging his qualifications for the job, and that communication ceased once it became evident that the charging party was deaf. The court further observed that the charging party's experience deviated significantly from the employer's "routinized procedure for selecting its employees," contributing to a genuine dispute as to whether its odd treatment of the charging party amounted to pretext.

Further, in the *EEOC v. Steel Painters LLC* case described above, the employer terminated the charging party's employment for failure to submit a form from his physician (SOP-57) concerning the effect of his use of methadone on a safety-sensitive position. The court denied the employer's motion for summary judgment as to whether sufficient evidence existed to establish bias and/or pretext, noting that the EEOC had set forth sufficient evidence to go to a jury on this issue as well. Specifically, the administrative manager noted they did not normally hire people on methadone, acknowledged in an email that the drug was used to treat a disability covered by the ADA, and explained in another email how to avoid hiring a prospective new hire by moving positions around, and documenting that the new hire is no longer needed, all of which statements could lead a reasonably jury to interpret as evidence of discriminatory animus as opposed to a true safety concern regarding his specific job duties.

Similarly, in *EEOC v. PML Services LLC*, referenced above and involving the housekeeper who had been discharged for excessive absences after having a seizure, the employer argued that the EEOC would be unable to establish, as a matter of law, that the charging party's employment was terminated on account of her disability or because the employer refused to accommodate her. The court rejected this argument as well, finding that the issue of causation should also go to the jury in light of, for example, comments by the charging party's supervisor during the termination meeting expressing "grave concerns" about the charging party's "ability for attendance," and accusing the charging party of failing to "disclose" her seizure disorder before she was hired.

561 *EEOC v. PML Services LLC*, 2020 U.S. Dist. LEXIS 115578 (W.D. Wis. July 1, 2020).
562 *EEOC v. Cracker Barrel Old Country Store, Inc.*, 2020 U.S. Dist. LEXIS 7528 (D. Md. Jan. 16, 2020).

2. Joint Employer

As noted, the federal courts considered a handful of atypical issues this FY 2020. In two of the matters decided this year, the federal courts considering the issue found in favor of both defendants that disavowed the joint employer relationship and/or joint employer liability.

In *EEOC v. Global Horizons, Inc.*,[563] the EEOC filed a partial motion for summary judgment, seeking a ruling that third-party Growers should have known that Global Horizons, Inc., or any other farm labor contractor, needed to be monitored, but that Growers chose not to and by that choice are therefore liable. The court determined that the EEOC presented insufficient evidence to support its theory that Growers retained the power to control the manner in which Global provided housing, meals, transportation, and wages to the Thai workers. The court further determined that the EEOC failed to present sufficient evidence to support its theory that Growers were jointly liable for Global's alleged discriminatory conduct because it failed to establish that Growers knew or should have known about Global's conduct and failed to undertake prompt corrective measures that were within its control.

Similarly, in *EEOC v. Village at Hamilton Pointe LLC*,[564] Tender Loving Care Management, Inc. (TLC) moved for summary judgment, arguing that it was not a joint employer in the class-wide race discrimination case. The court granted TLC's motion, finding that although TLC was owned and operated by the same owners as Hamilton Pointe, TLC merely provided administrative services pursuant to contract, had no authority to hire, fire, or discipline any of the class members, is not listed on any of the class members' payroll records, and does not control scheduling.

3. Religious Discrimination (Hairstyle)

In *EEOC v. Publix*,[565] the EEOC sued the employer for religious discrimination on behalf of an individual who was hired, but never employed, after being unable to comply with the employer's appearance policy as it related to his hairstyle. The charging party, a Rastafarian, informed the employer that he was unable to comply with the appearance policy (requiring men to keep their hair above their shirt collar), as his religious beliefs precluded him from cutting his dreadlocks. The EEOC originally alleged constructive discharge, because the employer had hired the charging party before the charging party informed it of his inability to comply with the policy for religious reasons. The employer moved for summary judgment. The EEOC also moved for summary judgment on the issue of liability on all of its claims.

The court denied both motions as to the EEOC's religious discrimination claims, but granted the employer's motion for summary judgment on the EEOC's constructive discharge claim. With respect to the latter, the court held that the EEOC's claim was more appropriately pursued as a failure to hire/failure to accommodate claim, as the charging party had never worked for defendant such that his working conditions could not have become "intolerable" to the point a reasonable person in his position would have had no choice but to resign. With respect to the former, the court found that there existed a material dispute of fact as to whether the charging party held a sincere religious belief (Rastafarianism) that conflicted with the employer's appearance policy; whether he informed the employer of the conflict; and whether he was not hired because of the conflict (the employer argued that he voluntarily withdrew his offer, while the EEOC claimed that it was "clear" his offer of employment was rescinded because of the sincerely held religious belief).

Additional information on these and other summary judgment decisions issued in FY 2020 can be found in Appendix E to this Report.

I. Default Judgment

In FY 2020, courts addressed whether, and to what extent, default judgments were appropriate in cases brought by the EEOC.

In *EEOC v. Roark-Whitten Hospitality 2, LP*,[566] the court considered default judgment in the context of successor liability. The EEOC sued the defendant hospitality company alleging that it engaged in unlawful employment practices against employees at a hotel defendant owned.[567] After learning that the defendant sold the hotel, the EEOC filed an amended

563 *EEOC v. Global Horizons, Inc.*, 2020 U.S. Dist. LEXIS 48836 (E.D. Wash. Mar. 20, 2020).
564 *EEOC v. Village at Hamilton Pointe LLC*, 2020 U.S. Dist. LEXIS 55870 (S.D. Ind. Mar. 31, 2020).
565 *EEOC v. Publix Super Mkts.*, 2020 U.S. Dist. LEXIS 151066 (M.D. Tenn. Aug. 20, 2020).
566 *EEOC v. Roark-Whitten Hospitality 2, LP*, 2019 U.S. Dist. LEXIS 222975 (D.N.M. Dec. 30, 2019), *appeal docketed*, No. 20-2023 (10th Cir. May 25, 2020).
567 *Id.* at **1-2.

complaint naming the successor as a defendant.[568] After counsel for the defendant and successor withdrew, the court entered default judgment against the defendant and successor on all issues of liability and set a hearing to determine damages and injunctive relief.[569]

Notwithstanding the default judgment, at the hearing, the successor argued that dismissal of the complaint was warranted because the EEOC failed to plead that the successor had notice of the claims in a manner sufficient to hold the successor liable under a theory of a successor liability.[570] The court reiterated the standard that a defaulting defendant "admits a complaint's well-pleaded allegations, but not legal conclusions" and "there must be a sufficient basis in the pleadings to support the judgment."[571] Thus, a court has an obligation to undertake an independent review and if "a plaintiff's claim would be barred or dismissed on a Rule 12(b)(6) motion, it cannot be the basis of a default judgment."[572]

Applying the above standard, the court dismissed the claims against the successor, holding that the operative complaint failed to state a plausible claim of successor liability because it did not plausibly allege that the successor had notice of the charges.[573] As against the original defendant hospitality company, the court awarded $35,000 in compensatory damages — but declined to award punitive damages or award injunctive relief.[574]

In *EEOC v. Pacific Fun Enterprises*,[575] the EEOC sued an employer, alleging sexual harassment and retaliation in violation of Title VII. After the defendant failed to answer, the clerk entered default, and the EEOC moved for default judgment.[576] The court noted that it had discretion to grant a motion for default judgment and identified the seven factors to consider in the Ninth Circuit: (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying Federal Rules of Civil Procedure favoring decisions on the merits.[577]

Considering these factors, the court determined that default judgment was warranted because: (1) plaintiffs would be left without a remedy unless the court granted the motion (first factor); (2) the complaint established the EEOC's claims in sufficient detail and provided clear support for those claims (second and third factors); (3) the district court has wide discretion in determining the amount of damages to be awarded (fourth factor); (4) there was no dispute as to the material facts, as the facts in the complaint are taken as true and the complaint sufficiently pleads harassment and retaliation (fifth factor); (5) there was no evidence of excusable neglect (sixth factor); and (6) the defendant's failure to answer made a decision on the merits impossible (seventh factor).[578] The court awarded $255,302.53 in compensatory damages, punitive damages, back pay, and pre-judgment interest.[579]

In *EEOC v. Global Horizons, Inc.*,[580] the court considered the extent to which a default judgment could be used against co-defendants and alleged joint employers in a case alleging race and national origin discrimination. In this instance, the EEOC filed suit against a staffing company as well as a number of farms and orchards (the "grower defendants"). The court initially granted summary judgment for the grower defendants and dismissed the claims against the grower defendants with prejudice. After the grower defendants were dismissed from the case, the court entered default and default judgment against the co-defendant staffing company and alleged joint employer, which included extensive findings of fact concerning discrimination by the co-defendant staffing company.[581] After entry of the default judgment against the co-defendant, the Ninth Circuit reversed the summary judgment and dismissal in the grower defendants' favor and remanded the case.

568 *Id.* at *2.
569 *Id.* at **3-4.
570 *Id.* at *7.
571 *Id.* at *11.
572 *Id.* at **11-12.
573 *Id.* at **12-14.
574 *Id.* at **15-17.
575 *EEOC v. Pacific Fun Enterprises*, 2020 U.S. Dist. LEXIS 12818 (D. Haw. Jan. 7, 2020), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 12438 (D. Haw. Jan. 23, 2020).
576 *Id.* at *3.
577 *Id.* at **19-20.
578 *Id.* at **20-28.
579 *Id.* at **32-33.
580 *EEOC v. Global Horizons, Inc.*, 2020 U.S. Dist. LEXIS 48836 (E.D. Wash. Mar. 20, 2020).
581 *Id.* at **64-71.

On remand, the EEOC argued that the findings of fact in the default judgment against the co-defendant staffing company could be used to establish liability against the grower defendants.[582] In rejecting the EEOC's argument, the court held that the co-defendant staffing company's default did not taint the grower defendants. The court found "several defects" in the EEOC's position that the findings of fact against the co-defendant staffing company should also apply with respect to the grower defendants.[583] First, the EEOC failed to establish a sufficient connection between the co-defendant and the grower defendants to establish that the co-defendant was acting as the grower defendants' agent.[584] Second, none of the default findings affecting the co-defendant staffing company concerned the grower defendants' actions.[585] Third, the court had already entered summary judgment in the grower defendants' favor before the default judgment against the staffing company.[586] Thus, the court rejected the application of res judicata and collateral estoppel because the grower defendants did not have an opportunity to be heard on the matters set forth in the default judgment. As the court explained: "Due process requires that a party be given notice and an opportunity to be heard before adverse action is taken against them. The [grower defendants] were not parties in the case at the time that the default judgment adjudicated the discriminatory nature of [the co-defendant's] conduct, and, therefore, the [grower defendants] did not have an opportunity to be heard prior to remand."[587]

In *EEOC v. Aviation Port Services, LLC*,[588] the EEOC alleged that the defendant discriminated against six Muslim women when it refused to grant them a religious accommodation to its uniform policy and terminated their employment.[589] After the defendant's counsel withdrew, the court entered a default against defendant and the EEOC moved for default judgment seeking back pay, pre-judgment interest, compensatory damages, punitive damages, and injunctive relief.[590]

Accepting the well-pleaded factual allegations in the complaint and affidavits as true, the court found that the defendant denied the women a reasonable accommodation to the uniform policy and discharged the six women because of their religion.[591] After conducting an independent determination and calculation, the court awarded the six former employees, collectively, $63,162.75 in back pay, $7,895.34 in prejudgment interest, and $450,000 in compensatory damages for emotional distress, but denied the EEOC's request for punitive damages and injunctive relief.[592]

J. Bankruptcy

A defendant's or charging party's bankruptcy declaration will not necessarily stay an EEOC lawsuit. For example, in *EEOC v. Krystal Co.*,[593] the EEOC sued defendant under the ADA seeking injunctive relief, back pay and front pay for defendant's former employee, compensation for pecuniary and non-pecuniary losses, punitive damages, and costs. The former employee filed her own complaint against defendant, which was consolidated with the EEOC complaint and treated as an intervenor complaint. The defendant subsequently filed for Chapter 11 bankruptcy, filed a notice of the bankruptcy to obtain an automatic stay, and moved to stay proceedings not subject to an automatic stay.

The EEOC opposed the notice and motion to stay, contending that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)(4). Defendant argued that the police-power exception did not apply because: (1) any injunctive relief the EEOC seeks is likely to be moot, because the defendant intends to sell its assets to another company; and (2) the defendant is unaware of any cases applying the police-power exception in cases involving claims brought by both the EEOC and a private litigant.[594]

After surveying authority from around the country, the court "agree[d] with those courts that have considered the issue and finds that the police-power exception applies to the EEOC" because "the EEOC brings claims under the ADA for injunctive and monetary relief in the course of exercising its police or regulatory powers, and it is therefore not subject to the automatic stay."[595] The court also declined to exercise its authority to stay a case pending the resolution of a related case in

582 *Id.* at **60, 71.
583 *Id.* at *71.
584 *Id.*
585 *Id.* at **71-72.
586 *Id.* at *72.
587 *Id.* at 73-75 (internal citations omitted).
588 *EEOC v. Aviation Port Services, LLC*, 2020 U.S. Dist. LEXIS 57073 (D. Mass. Apr. 1, 2020).
589 *Id.* at *1.
590 *Id.* at **6-8
591 *Id.* at *9.
592 *Id.* at **9-38.
593 *EEOC v. Krystal Co.*, 2020 U.S. Dist. LEXIS 92482 (N.D. Ga. May 21, 2020).
594 *Id.* at **3-4.
595 *Id.* at *6.

another forum, finding its discretionary stay authority inapplicable where a more specific stay mechanism (*i.e.*, bankruptcy stay) expressly did not apply.[596] In doing so, the court rejected the argument that a stay of the intervenor complaint required staying the EEOC lawsuit, recognizing that "while it is true that there is some overlap between the EEOC's claims and those of the intervenor, it is not unusual for litigation to proceed as to the EEOC while the claims of an intervenor are stayed."[597] Finally, the court stated that "the fact that the claims for injunctive relief may end up being moot at the conclusion of the bankruptcy proceedings is not a sufficient reason to stay the claims now—especially when that argument is insufficient to preclude application of the police-power exception to the automatic stay."[598]

K. Trial

The pandemic likely had an impact on the number of lawsuits brought to trial in FY 2020. The FY 2020 cases that did see a courtroom—albeit virtual in some instances—produced some interesting pre- and post-trial motions.

1. Pre-Trial Motions

The pandemic factored into pre-trial motions in EEOC litigation. In *EEOC v. Oatridge Security Group, Inc.*, the defendants moved to continue trial "based primarily on complications arising from COVID-19, particularly as they have impacted the parties' discovery efforts."[599] The EEOC and plaintiff-intervenor opposed the motion, arguing it would prejudice them and that the defendants had "failed to diligently conduct discovery or to litigate this case."[600]

In rejecting these arguments, the court began by observing that there had been no prior continuances in the matter and that there was "no evidence of willful or dilatory conduct on defendants' part."[601] The court then explained that any potential prejudice was likely to be "outweighed by the prejudice that would result if the parties were unable to conduct complete discovery due to COVID-19."[602] The court further explained that, because the pandemic had caused the courthouse to close for more than six months, upon its reopening the court would "have a backlog of both criminal and civil jury trials," making it "very unlikely that this matter can proceed to trial as scheduled on February 1, 2021."[603] While the court was "sympathetic to plaintiff's and plaintiff-intervenor's desire to resolve this matter promptly," it emphasized that "COVID-19 has upended life as we know it," and that "many litigants have faced delays longer than the one requested by defendants here."[604] The court therefore concluded that the defendants had established good cause for their motion under Federal Rule of Civil Procedure 16(b).[605]

2. Trial Motions and Evidentiary Rulings

Although it addressed cross-motions for summary judgment, the court's discussion of the hearsay rule in its opinion in *EEOC v. Global Horizons, Inc.*,[606] (a multi-defendant case) may affect litigants at trial stage as well. In particular, the court addressed the rules of admissibility where the plaintiff introduces statements from an employee supplied by a third party against a defendant who did not employ that worker.

The two defendants at issue in the motions, both farm owners, had contracted with the third staffing company defendant in the case to receive temporary workers for, among other things, harvesting their crops.[607] The EEOC maintained that some of these workers had been subject to poor working conditions and threatening and intimidating treatment, all because of their race or national origin.[608] To support its position, the Commission relied "almost exclusively" on the deposition testimony of an "orchard supervisor" employed by the third defendant.[609] According to the EEOC, the supervisor's testimony supported the conclusion that the third defendant's chief executive officer and "primary orchard manager" had expressed discriminatory stereotypes of the workers.[610] The EEOC did not adduce evidence that the farm owners had engaged in discriminatory conduct

596 *Id.* at *8.
597 *Id.* at *9.
598 *Id.*
599 *EEOC v. Oatridge Sec. Grp., Inc.*, 2020 U.S. Dist. LEXIS 169544, *2 (W.D. Wash. Sept. 16, 2020).
600 *Id.*
601 *Id.*
602 *Id.*
603 *Id.* at **2-3.
604 *Id.* at *3.
605 *Id.*
606 *EEOC v. Global Horizons, Inc.*, 2020 U.S. Dist. LEXIS 48836 (E.D. Wash. Mar. 20, 2020).
607 *Id.* at **4-5.
608 *Id.* at *46.
609 *Id.* at *7.
610 *Id.* at *47.

themselves.[611] Instead, pointing to the supervisor's testimony, the EEOC maintained that the farm owners had "affirmed" the statements of the chief executive officer and manager "through a nod of [the] head" and certain "vague statements."[612] The farm owners countered that the staffing company supervisor's testimony was inadmissible hearsay.[613]

Opining that the supervisor's deposition testimony was "rife with evidentiary problems," the court agreed with the farm owners and refused to consider the supervisor's testimony.[614] The court began its analysis by observing that the deposition testimony did indeed constitute hearsay, since it was an "out of court statement" offered by the EEOC "for the truth of the matter asserted."[615] It was therefore incumbent on the EEOC to demonstrate that the statements fell into one of the hearsay exceptions or exclusions identified in the Federal Rules of Evidence.[616] Under Federal Rule of Evidence 801, a hearsay statement is nevertheless admissible if it is "offered against an opposing party" and "'was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.'"[617] This, however, was of no benefit to the EEOC. The court explained that while the supervisor may have performed labor for the farm owners, "[t]here is no evidence that [he] ever was an *employee* of [the farm owners]."[618] Upon concluding that the EEOC had shown no other grounds for rendering the hearsay statements admissible, the court concluded that the EEOC had failed to adduce evidence that the alleged adverse working conditions related to the workers' race or national origin.[619]

3. Post-Trial Motions

In *EEOC v. United Health Programs of America, Inc.*,[620] the court addressed the defendants' motions for judgment as a matter of law and for new trial, or, in the alternative, for remittitur.[621] The EEOC alleged that the defendants subjected nine claimants to a hostile work environment based on employer-imposed religious practices, eight claimants to disparate treatment based on resistance to those practices, and one claimant to disparate treatment and retaliation based on that claimant's religious beliefs.[622]

By way of brief background, an employer instituted a conflict-resolution program, developed by the chief executive officer's aunt, called "Onionhead." While the CEO's aunt initially developed Onionhead for children, she adjusted the program and placed it under the umbrella of her "Harnessing Happiness" programs. The EEOC filed suit on behalf of employees, who claimed they were forced to subscribe to this program despite its religious nature. In support of their claims, the claimants presented the aunt's e-mails, which included references to God, spirituality, demons, Satan, divine destinies, purity, blessings, and miracles.[623]

Following a three-week trial, the jury returned a verdict partially in the EEOC's favor, awarding claimants a total of $5,102,060 in compensatory and punitive damages. Recognizing that the defendants employed more than 14 but fewer than 100 employees, the court reduced the claimants' awards to the extent their claims arose under Title VII based on the statute's $50,000 per-claimant cap on compensatory and punitive damages.[624] Without prejudicing the defendants' right to move for remittitur, the parties agreed that, based on these caps, the court should reduce the claimants' combined compensatory and punitive damages award to $1,778,000.[625]

In their motions, the defendants asserted three arguments. The defendants maintained that (1) no reasonable jury could have found for two particular claimants' claims of hostile work environment; (2) the claimants' emotional distress awards were excessive; and (3) no reasonable jury could have found punitive damages for two particular claimants, or the evidence did not support such a finding.[626]

611 *Id.* at *44.
612 *Id.* at *47.
613 *Id.*
614 *Id.* at **48-49.
615 *Id.*
616 *Id.* at *49.
617 *Id.* at **49-50 (quoting Fed. R. Evid. 801(d)(2)(D)).
618 *Id.* at *50 (emphasis added).
619 *Id.* at *60.
620 *EEOC v. United Health Programs of Am., Inc.*, 2020 U.S. Dist LEXIS 39587 (E.D.N.Y. Mar. 6, 2020).
621 *Id.* at *2.
622 *Id.* at *4.
623 *See, e.g.*, Darren E. Nadel and William E. Trachman, *Company Practices "Onionhead" – Employees Cry Reverse Religious Discrimination*, Littler Insight (Oct. 13, 2016).
624 2020 U.S. Dist LEXIS 39587 at *6.
625 *Id.*
626 *Id.* at *9

The court summarized the relevant legal standards. It observed that "[i]f a party believes that a reasonable jury would not have a legally sufficient evidentiary basis to find for its adversary on a particular issue, it may move for judgment as a matter of law during trial under Federal Rule of Civil Procedure 50(a) and renew the motion after trial under Rule 50(b)."[627] "When evaluating a motion under Rule 50, courts are required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable inferences that the jury might have drawn in its favor from the evidence."[628] "The court cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury . . . ."[629] "A court may grant a Rule 50 motion only if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture," or if "a reasonable juror would have been compelled to accept the view of the moving party."[630] The court explained that, when ruling on a renewed motion under Rule 50, a court may "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law."[631]

The court then explained that a "party filing a renewed motion for judgment as a matter of law may include an alternative or joint request for a new trial under Rule 59" of the Federal Rules of Civil Procedure.[632] "The court may, on motion, grant a new trial on all or some of the issues after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."[633] The "general grounds for a new trial are that (1) the verdict is against the clear weight of the evidence; (2) the trial court was not fair; (3) substantial errors occurred in the admission or rejection of evidence or the giving or refusal of instructions to the jury; or (4) damages are excessive."[634] The court explained that, "[i]n contrast to a Rule 50 motion for a new trial, a Rule 59(a) motion for a new trial may be granted even if there is substantial evidence supporting the jury's verdict."[635] It also observed, however, that the Second Circuit holds that a "trial court should not grant a motion for a new trial unless it is convinced that the jury reached a seriously erroneous result or that the verdict is a miscarriage of justice" and when "the jury's verdict is egregious."[636]

Turning to the defendants' first argument, the court concluded: "there was more than sufficient evidence for the jury to conclude that [the two claimants] experienced an objectively hostile work environment" and "subjectively perceived their work environment as hostile."[637] The EEOC contended that the defendants' supervisors and officers had imposed on the claimants "certain practices and beliefs, often referred to as 'Onionhead' and 'Harnessing Happiness.'"[638] The record contained evidence that the defendants' "office environment was cluttered with pervasive religious imagery, including rosary beads, Buddhas, and Onionhead/Harnessing Happiness literature, posters and banners," and that "employees were scheduled for attendance and participation at the Onionhead/Harnessing Happiness workshops, which employees understood were mandatory."[639] There was also evidence that the "Onionhead religion motivated certain idiosyncratic office practices, including the dismantling of overhead lights, use of candles, incense, and table lamps, hugging and kissing of coworkers, praying and meditation, and coworkers being directed to say 'I love you.'"[640] Considering this evidence "in the light most favorable to plaintiff under Rule 50," the court found that "there was a legally sufficient basis for a reasonable jury to find for [the claimants] on their hostile work environment claims."[641] Moreover, because the court considered the jury's findings to be "neither a seriously erroneous result," nor a "miscarriage of justice," the court refused to grant a new trial under Rule 59.[642]

The court also rejected the defendants' second argument: namely, that the claimants' emotional distress awards were excessive and that the court should reduce or set them aside. The court observed that "[w]here there is no particular discernible error, the Second Circuit has generally held that a jury's damage award may not be set aside as excessive unless the award is so high as to shock the judicial conscience and constitute a denial of justice."[643] It further observed that "[i]n determining whether

627 *Id.* at *10.
628 Id at **10-11.
629 *Id.* at *11.
630 *Id.* at **11-12.
631 *Id.* *10.
632 *Id.* at *12.
633 *Id.*
634 *Id.*
635 *Id.*
636 *Id.* at *13.
637 *Id.* at *31.
638 *Id.* at *3.
639 *Id.* at **31-32.
640 *Id.* at *32.
641 *Id.* at *34.
642 *Id.* at *35.
643 *Id.* at *36.

a compensatory damage award is excessive, courts consider amounts awarded in other, comparable cases."[644] "In the Second Circuit, 'garden variety'[645] emotional distress claims generally merit $30,000 to $125,000 awards, and courts have declined to reduce even much higher emotional damages awards."[646] The defendants maintained that "garden variety" awards for emotional distress in excess of $35,000 are inappropriate.[647] Rejecting their contention, the court explained that the defendants "rel[ied] on a 2005 case," but "[m]ore recent cases" indicate that the top boundary for garden variety awards is "significantly higher."[648] Indeed, the court concluded that "$50,000 is toward the low end of garden variety emotional distress damages in this circuit."[649] Upon concluding that the evidence in the record was sufficient to support the award of emotional distress damages, the court explained that it would "not further reduce the awards."[650]

Finally, the court also rejected the defendants' argument that the evidence did not support a punitive damages award for two of the claimants. The court first explained that "Title VII provides for the recovery of punitive damages if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[651] The defendants argued that no such finding was supportable, given the evidence in the record of an anti-harassment policy.[652] While acknowledging that such a policy could "go a long way towards dispelling any claim about the employer's reckless or 'malicious' state of mind," the court nevertheless rejected the argument in light of the evidence that the relevant policies were inconsistently disseminated, did not address workplace harassment, and did not provide a clear avenue for reporting discrimination.[653] The court also rejected the defendants' argument that the EEOC's "reverse religious discrimination" theory was incapable of supporting a finding of malice or reckless indifference to federally protected rights.[654] The court agreed with the EEOC's response that, "while Onionhead may be 'novel,' the underlying theory of discrimination in this case—that employees cannot be forced to participate in religious activities as a condition of their employment—is not."[655] Upon rejecting these arguments, the court concluded that "a reasonable jury would not have been compelled to find in defendants' favor regarding punitive damages" when viewing the evidence in the light most favorable to the claimants.[656] "Even weighing the evidence under Rule 59, the court [could not] conclude that the jury's verdict was seriously erroneous or a miscarriage of justice."[657]

L. Remedies

1. Remedies Generally

The cases decided in FY 2020 contained several helpful discussions of the remedies available under statutes administered by the EEOC. The first such discussion appears in the *EEOC v. Baltimore County*,[658] where the court addressed an issue involving the back pay remedy under the ADEA. In 2012, the court granted partial summary judgment with respect to the defendant's liability on the merits. In particular, it found that the defendant had administered a pension plan for its employees in a discriminatory manner by requiring older employees to pay higher contribution rates than younger employees.[659] On April 26, 2016, the court approved a joint consent order agreed upon by the parties whereby the defendant was to equalize contribution rates by July 1, 2018.[660] The court subsequently concluded that it had discretion to fix appropriate relief upon a finding of age discrimination, and it determined the parties' consent order obviated the need for back pay or prospective relief.[661] The EEOC appealed the court's order with respect to the issue of back pay but not the issue of prospective relief.[662] The U.S. Court of

644 *Id.*
645 The court explained that "[e]motional distress awards within the Second Circuit can generally be grouped into three categories of claims: 'garden-variety,' 'significant' and 'egregious.'" *Id.* at **37-38 (citations and internal quotation marks omitted). The court then observed that the EEOC had "not asserted that 'significant' or 'egregious' emotional distress damages are warranted." *Id.* at *38.
646 *Id.*
647 *Id.* at *40.
648 *Id.*
649 *Id.* at *45.
650 *Id.*
651 *Id.* at *72.
652 *Id.* at *73.
653 *Id.* at *74.
654 *Id.* at **76-77.
655 *Id.*
656 *Id.* at *79.
657 *Id.*
658 *EEOC v. Baltimore Cty.*, 2019 U.S. Dist. LEXIS 185913 (D. Md. Oct. 28, 2019)
659 *Id.* at **3-4.
660 *Id.* at 5.
661 *Id.*
662 *Id.*

Appeals for the Fourth Circuit vacated the order, holding that "a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability."[663] The U.S. Supreme Court denied the defendant's petition for a writ of certiorari.[664]

Upon resuming proceedings in the district court, the parties sought clarification on the temporal scope of the mandatory back pay award.[665] The EEOC maintained that it was entitled to pursue a back pay award accruing until January 1, 2019, the date when the defendant ultimately phased out the discriminatory contribution rates.[666] The defendant proffered several alternative dates, including the date on which the court approved the parties' consent order.[667] Siding with the defendant,[668] the court began by observing that back pay generally ceases to accrue "if the ADEA violation is remedied before judgment."[669] The court then observed that its previous decision denying retroactive and prospective monetary relief rested, in part, on its finding that the parties' consent order "allowed the EEOC to fulfill its public policy goal of eliminating age discrimination in the [defendant's] pension system."[670] Although the Fourth Circuit vacated that order, it had not opined on whether the back pay award might properly be subject to a reduction.[671] The court therefore concluded that, "[o]n remand, it still appear[ed] grossly unfair to hold the [defendant] liable for back pay accruing during the implementation of a plan agreed to by all parties."[672] "In this case, the parties cooperated to fashion a method of eliminating the discriminatory rates, and it is the enactment of this remedy which terminates the period of back pay."[673] Nor could the EEOC argue it was entitled to a prospective award accruing through January 1, 2019, as it had not appealed the court's previous decision with respect to the issue of prospective monetary relief.[674]

The FY 2020 cases also included *EEOC v. Local 638*,[675] which involved a union's application to begin separating itself from mandatory court supervision that had been in effect for more than 40 years.[676] The United States filed the action to redress systemic race and national origin discrimination in 1971.[677] Since initial judgment in 1975, the union had been subject "to a multitude of constraints and affirmative action requirements," including "a requirement to provide certain services called the 'MAP/ETER Services,' compulsory payments to a 'MAP/ETER FUND' to finance those services, and oversight by a Special Master."[678] The court explained that the "MAP/ETER FUND is the 'Employment, Training, Education and Recruitment Fund' established . . . as a depository for coercive fines imposed on the [u]nion."[679] It further explained that the fund is "primarily for MAP (Member Assistance Program) services."[680] Finally, the court observed that it had entered a "Structural Changes Order ('SCO')" in March 2015, which provided as follows:

> If and when [the union] determines that it is in a position to provide the services currently provided by the MAP/ETER FUND . . . , [the union] may seek to transition all such services to [the union] and its appropriate Funds and Plans by making an application to the Court to demonstrate that it is capable of adequately providing the MAP/ETER Services . . . .[681]

The SCO further provided that any application to transition MAP/ETER Services to the union would require the union "to demonstrate that it is 'capable' of 'adequately providing' the MAP/ETER Services."[682]

663 *Id.* at *6 (quoting *EEOC v. Baltimore Cty.*, 904 F.3d 330, 333 (4th Cir. 2018)).
664 *Id.*
665 *Id.* at *7.
666 *Id.* at **11-12.
667 *Id.* at *12.
668 Although the court sided with the defendant on the issue of the temporal scope of the mandatory back pay award, it also observed that the case had "been the subject of numerous appeals and several remands to this Court." *Id.* at *16. Therefore, "[t]o conserve judicial resources in the event of another appeal," the court allowed the parties to conduct discovery on the damages accruing through both parties' requested cessation dates to allow findings in the alternative. *See Id.* at **16-17.
669 *Id.* at *13.
670 *Id.* at **13-14.
671 *Id.*
672 *Id.*
673 *Id.* at *15.
674 *See Id.*
675 *EEOC v. Local 638*, 2019 U.S. Dist. LEXIS 192061 (S.D.N.Y. Oct. 22, 2019).
676 *Id.* at *5.
677 *Id.*
678 *Id.*
679 *Id.* at *7.
680 *Id.* at **7-8.
681 *Id.* at *7.
682 *Id.*

Neither the EEOC nor any other party to the litigation opposed the union's application to transition responsibility for the MAP/ETER Services to itself.[683] Yet, the special master d*Id.*[684] Among the special master's "primary arguments" against transition was the contention that the union should not assume the services until it had achieved "substantial compliance" with the "various orders" entered against it during the long history of the case.[685] While the SCO did not require such "substantial compliance" as a precondition to the transition, the special master argued it was nonetheless required because the transition would effectively modify the court's existing remedial orders relating to the MAP/ETER Fund.[686] In particular, the special master argued it would "eliminate[e] payment of coercive fees that contribute to the ETER/MAP Fund."[687] The court, however, dismissed these objections. It began by noting that "[i]t is not entirely clear that the Second Circuit applies a 'substantial compliance' standard for modifying decrees."[688] The court then observed that the transition procedure envisioned by the SCO was sensible, given the practical realities that would attend the union's assumption of the services. Although "[t]he net effect of transition . . . will be that the [u]nion ceases contributing to the MAP/ETER Fund," that effect "is in part a function of the [u]nion's taking over responsibility for providing the services it previously funded someone else — the Special Master — to provide."[689]

Notably, the court did not find all of the union's arguments convincing. In particular, the court was unmoved by what the special master characterized as, in essence, a plea from the union to "trust us." The court averred that it formed "no opinion as to whether the Union can be 'trusted,'" and it agreed that "a 'trust us' entreaty is not a valid consideration for determining whether the [t]ransition [a]pplication should be approved" under the SCO.[690] In addition, the court observed that under the SCO, the court's grant of the transition application would allow the union to assume the MAP/ETER services on a trial basis only, and that the union would be required to make quarterly reports to the special master regarding its provision of those services.[691] Indeed, the transition sought by the union amounted to only "an initial, modest step toward independence."[692] Upon reviewing the "specific plans" proffered by the union for providing the services, the court nevertheless concluded that the union had met its burden under the SCO of demonstrating that it was "capable" adequately "providing" them.[693]

Finally, this fiscal year included an opinion containing a helpful summary of the law governing back pay, compensatory damages, and punitive damages in the context of a suit by the EEOC under Title VII. In *EEOC v. Pacific Fun Enterprises, LLC*,[694] the court addressed a motion for default judgment from the EEOC. The EEOC had brought suit under Section 706 of Title VII against the defendant, alleging it subjected the charging party and a class of similarly aggrieved female employees to sexual harassment. As discussed earlier in this Report, Section 706 of Title VII gives the EEOC authority to sue on behalf of one or more persons aggrieved by an unlawful discriminatory employment practice where the individual filed a charge with the Commission.[695] Likewise, Section 707 allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in Section 706.[696] Section 706 allows the EEOC to potentially recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

Upon observing that the defendant "made no opposition, objection, appearance, or other communications," the court granted the motion.[697] Addressing the issue of damages, the court began by observing that "[t]he EEOC is statutorily authorized pursuant to Title VII of the Civil Rights Act to seek back pay, compensatory and punitive damages."[698] It then engaged in a review of the law governing each of these categories of damages.

Beginning with back pay, the court explained that such an award is "appropriate to advance Congress' intent to make persons whole for injuries suffered through past discrimination."[699] "Back pay is calculated by subtracting the actual wages a

683 *Id.* at *6.
684 *Id.*
685 *Id.* at *13.
686 *Id.* at *14.
687 *Id.*
688 *Id.* at *14 n.9.
689 *Id.* at **14-15.
690 *Id.* at *18.
691 *Id.* at **9-11.
692 *Id.* at *11.
693 *Id.* at **8-9.
694 *EEOC v. Pacific Fun Enters, LLC*, 2020 U.S. Dist. LEXIS 12818 (D. Haw. Jan. 7, 2020).
695 42 U.S.C. § 2000e-5(e)(1).
696 42 U.S.C. § 2000e-6(e).
697 2020 U.S. Dist. LEXIS 12818 at **1-2.
698 *Id.* at *28.
699 *Id.* at **28-29.

discharged employee earned subsequent to [the discriminatory act] from the amount the employee would have earned absent the employer's discriminatory conduct."[700] Unlike compensatory and punitive damages, back pay is not subject to statutory caps and "remains an equitable remedy to be awarded by the district court in its discretion."[701] Additionally, the court noted that "[a]n award of prejudgment interest on back pay award is appropriate."[702]

The court then turned to a review of the law governing compensatory and punitive damages. Beginning with compensatory damages, the court explained that it "may award compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."[703] The court observed that a "claimant's testimony alone may be sufficient to support an award of compensatory damages for emotional harm."[704] Indeed, it observed that the Ninth Circuit has "upheld awards of substantial damages based solely on the victim's testimony and circumstantial evidence."[705] As for punitive damages, the court explained that such damages are "available where the employer engaged in conduct with reckless indifference to the federally protected rights of an aggrieved individual."[706] "Egregious conduct is not required"; rather, the standard is "whether the employer had at least discriminated in the face of a perceived risk that its actions will violate federal law."[707] The court nevertheless noted that "reprehensibility of the defendant's conduct is the most important element in evaluating the appropriateness of punitive damages."[708] The "Ninth Circuit has reiterated that intentional discrimination is a serious affront to personal liberty and should be considered high on the reprehensibility scale for purposes of assessing punitive damages."[709]

2. Punitive Damages

In the FY 2020 case of *EEOC v. Roark-Whitten Hospitality 2, LP*,[710] the court declined to award punitive damages following entry of a default judgment as to liability. As stated by counsel for the EEOC at oral argument, the case involved a "'No Spanish' policy allegedly implemented by the employer."[711] Under the alleged policy, the employer's president prohibited employees from speaking Spanish in his presence "because he did not understand it."[712] In addition, the EEOC maintained that the president "asked the employees to anglicize their names."[713] The court began its analysis by explaining that "[p]unitive damages may be awarded in Title VII cases where the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[714] It further observed that the standard for obtaining punitive damages is "higher than for compensatory damages."[715] Upon considering the EEOC's allegations regarding the "No Spanish" policy and the request to anglicize names, the court concluded that it was "not persuaded."[716]

M. Settlements

At least one recent case has demonstrated the importance of parties' compliance with court orders requiring the preparation of settlement conference statements in advance of settlement conference with magistrate judges.

In United States *EEOC v. KS Aviation, Inc.*, the defendants failed to timely submit a court-ordered confidential settlement conference statement two weeks prior to the conference date.[717] As a result, the court issued an order requiring defendants to show cause why sanctions should not issue for failing to comply with the court's order or, alternatively, to submit the requisite settlement statement within two days. In its opinion, the court noted that it "spends considerable time preparing for

700 *Id.* at *29.
701 *Id.*
702 *Id.*
703 *Id.* at *30.
704 *Id.*
705 *Id.* at **30-31.
706 *Id.* at *31.
707 *Id.*
708 *Id.*
709 *Id.*
710 *EEOC v. Roark-Whitten Hospitality 2, LP*, 2019 U.S. Dist. LEXIS 222975 (D.N.M. Dec. 30, 2019), *appeal docketed*, No. 20-2023 (10th Cir. May 25, 2020).
711 *Id.* at *14.
712 *Id.* at *15.
713 *Id.*
714 *Id.* at *16.
715 *Id.*
716 *Id.*
717 *United States EEOC v. KS Aviation, Inc.*, et al., 2020 U.S. Dist. LEXIS 140985 (E.D. Cal. Aug. 6, 2020).

settlement conference so as to make it meaningful to the parties and results in a greater likelihood of settlement success. . . . [the statements] are not pro forma."[718]

N. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[719] By its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[720]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[721] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[722] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[723] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[724]

In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $3.3 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[725] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who claimed they were sexually harassed. The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements, and remanded the matter back to the district court.

On remand, the district court once again held that the company was entitled to attorneys' fees, expenses, and costs. Specifically, the district court applied the *Christiansburg* standard and in an exhaustive, claim-by-claim analysis, determined that the 78 claims dismissed on summary judgment were frivolous, groundless, and/or unreasonable. On appeal, the Eighth Circuit upheld the fee award, finding that the district court did not abuse its discretion in applying the *Christiansburg* standard. The Eighth Circuit agreed that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims. In addition, the Eighth Circuit noted that the district court made particularized findings of frivolousness, unreasonableness, and groundlessness as to each individual claim dismissed on summary judgment. The Eighth Circuit also rejected the EEOC's allegation that it sought relief for the remaining women based on the pattern-or-practice burden of proof because the EEOC never actually alleged the company was engaged in "a pattern or practice" of illegal sex-based discrimination. The Eighth Circuit agreed with the district court's reasoning that, "[a]s the master of its own complaint, it was frivolous, unreasonable and/or groundless for the EEOC to fail to allege a pattern-or-practice violation and then proceed to premise the theory of its case on such a claim."[726]

In regard to company's calculation of attorneys' fees, the Eighth Circuit agreed that the company properly distinguished between costs associated with defending against frivolous, unreasonable, and/or groundless claims and those that did not meet that standard. In doing so, the Eighth Circuit held that the district court is not required "to become a green-eyeshade accountant pour[ing] over the record to calculate each individual claim. Instead the district court did rough justice by finding that the general method by which [the company] calculated the fees it now seeks was appropriate."[727]

718 *Id.* at **1–2 (emphasis in original).
719 42 U.S.C. § 2000e-5(k).
720 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
721 *Id.* at 422.
722 *Id.*
723 *Id.* at 421.
724 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)).
725 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).
726 *Id.* at 757.
727 *Id.* at 759 (quoting *EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1052 (N.D. Iowa 2017) (internal quotations omitted)).

In *EEOC v. HP Pelzer Automotive Systems, Inc.*, the U.S. District Court for the Eastern District of Tennessee rejected multiple attempts by the prevailing defendant to seek attorneys' fees. Following a successful trial in which a jury rejected the EEOC's retaliatory termination claims, the defendant filed a motion seeking $637,303.93 in attorneys' fees. The defendant argued that the EEOC's conduct during litigation was unreasonable, meritless, groundless, vexatious and in bad faith. In support of its argument, the company provided a recitation of the same honest belief argument it asserted at summary judgment, where it claimed it terminated the charging party's employment because it believed she fabricated allegations of sexual harassment. The magistrate judge recommended the court deny the defendant's motion because the defendant was attempting to relitigate its previously-denied summary judgment motion as a means to be awarded attorneys' fees.[728] The magistrate judge also reasoned that "[a] case substantive enough to submit to a jury is not frivolous, unreasonable, or without foundation."[729] Upon review, the district judge adopted in whole the magistrate judge's recommendation and denied the defendant's motion for attorneys' fees.[730]

In *EEOC v. Roark-Whitten Hosp. 2, LP*, the U.S. District Court for the District of New Mexico denied the defendant's request for attorneys' fees.[731] The district court previously granted the defendant's motion for summary judgment because the EEOC failed to allege facts sufficient to show that the defendant had constructive notice of the lawsuit, as there were successor liability issues. While the district court considered it a "close" call, it ultimately declined to award attorneys' fees to the defendant.[732] The district court reasoned that the EEOC's claim was not frivolous because it attempted to advance a theory of successor liability on constructive notice, as opposed to actual notice, and the supporting evidence was simply lacking.[733] In addition, the district court held that the EEOC's decision to pursue litigation against a successor without attempting to conciliate may be a questionable strategic decision, but such a decision does not render the underlying case frivolous under *Christiansburg*.[734]

In *EEOC v. Chalfont & Associates Group, Inc.*, the U.S. District Court for the Middle District of Florida awarded the EEOC a reduced amount of attorneys' fees after determining the EEOC's initial request was excessive.[735] The EEOC sought an award of $8,720 in fees for the work of two attorneys to prepare a motion to compel based on a rate of $400 per hour for 21.8 hours or work. Using the lodestar analysis (number of hours times a reasonable hourly rate), the court rejected the EEOC's request reasoning that it was simple motion to compel, which did not require two lawyers, each with over 10 years of experience.[736] Instead, the court found that $250 per hour for 16.7 hours was reasonable, and awarded the EEOC $4,175 in attorneys' fees.[737]

728 *EEOC v. HP Pelzer Auto. Sys.*, 2020 U.S. Dist. LEXIS 35622, at **5–6 (E.D. Tenn. Jan. 9, 2020).
729 *Id.* at *6.
730 *EEOC v. HP Pelzer Auto. Sys.*, 2020 U.S. Dist. LEXIS 34893 (E.D. Tenn. Mar. 2, 2020).
731 *EEOC v. Roark-Whitten Hosp. 2, LP*, 2020 U.S. Dist. LEXIS 47124 (D.N.M. Mar. 17, 2020).
732 *Id.* at **5–6.
733 *Id.*
734 *Id.*
735 *EEOC v. Chalfont & Assocs. Grp., Inc.*, 2020 U.S. Dist. LEXIS 50729 (M.D. Fla. Mar. 24, 2020).
736 *Id.* at *9.
737 *Id.* at *10.

VI. APPENDICES

APPENDIX A – EEO CHALLENGES TO EMPLOYER-MANDATED VACCINATION PROGRAMS

Applicable Case	Date Complaint Filed	Nature of Claim and Outcome
Jenkins v. Mercy Hosp. Rogers Case No. 5:19-CV-05221 (W.D. Ark. Mar. 17, 2020) Related decisions: 2020 U.S. Dist. LEXIS 45645, 2020 WL 1271371 (W.D. Ark. Mar. 17, 2020), granting in part the employer's Motion for Judgment on the Pleadings	12/4/19	*Religious Discrimination (Favorable Employer Outcome)* The hospital employer, a religious organization, adopted an influenza vaccination policy, requiring all employees to receive yearly influenza vaccinations, subject to religious or medical exemptions. Under the policy, if the exemption is granted, the employee is to wear a mask for the duration of the flu season. Plaintiff, a physical therapist for the hospital, "sincerely believed that requirements from various books of the Christian Old Testament—Leviticus and Deuteronomy are identified in the complaint—prohibit her from receiving an influenza vaccine." The hospital denied her request for an exemption and later terminated her employment on the basis of her refusal to receive the influenza vaccine. Plaintiff's supervisor told her in in her termination meeting that, "[t]he official religion that follows the Old Testament gets the flu shot, and the official religion that follows the New Testament also gets the flu shot." The district court found that "[t]he only reasonable inference that may be drawn from these facts is that [the hospital] discriminated against [plaintiff] on the basis of her religion when it refused to grant her a religious exemption under its influenza vaccination policy and then terminated her for not being vaccinated." In ruling in favor of the employer, however, the court clarified that the hospital "is not a typical employer." The hospital constitutes a religious organization that is exempt from Title VII. Instead, the court ruled on the "narrowly-defined controlling legal question" of whether the religious corporation otherwise covered by the religious organization exemption in 42 U.S.C. § 2000e-1(a) can "waive coverage of that exemption and be subjected to liability for religious discrimination in employment?" On this narrow question, the district court held that yes, because the employer is a religious corporation, it "remains free to discriminate against its employees on the basis of religion, whether or not [it] has adopted an internal policy claiming it will not do so."
Norman v. NYU Langone Health Sys. Case No. 1:19-CV-00067 (S.D.N.Y. Sept. 30, 2020) Related decisions: 2020 U.S. Dist. LEXIS 180990, 2020 WL 5819504 (S.D.N.Y. Sep. 30, 2020), granting Summary Judgment in favor of the employer	1/3/19	*Disability Discrimination (Favorable Employer Outcome)* Plaintiff was employed by a hospital as a Clinical Database Specialist—a role that did not involve direct patient contact and did not cause the plaintiff to work in areas where patients are typically present. The employer implemented a policy mandating that all employees be vaccinated, subject to approved exemptions based on medical or religious reasons. Defendant offers a vaccine without any egg proteins in lieu of the traditional egg-based vaccines. Plaintiff "characterizes her disability as an allergy to the flu vaccine," as she recalled previously reacting adversely to the vaccine, "experiencing shortness of breath and chest palpitations about fifteen to twenty-five minutes after receiving the vaccine, with the symptoms lasting around ten to twenty minutes." In 2017, the plaintiff's primary care physician indicated to the employee that the plaintiff was allergic to eggs, and that she had had a previous reaction to the flu vaccine. The employer referred the plaintiff to another physician for a follow-up, which the plaintiff initially refused, but then relented upon threat of job termination. This physician recommended a skin test to test her reaction to the non-egg-based vaccine, which the plaintiff again initially refused but then complied with, under threat of termination. Plaintiff was administered the skin test, which showed a negative reaction, and then was administered the vaccine. Forty minutes later, she began experiencing shortness of breath and palpitations, at which point the doctor administered albuterol and an EpiPen injection, and the plaintiff was transported to the emergency department. Plaintiff's discharge assessment states: "presentation inconsistent with allergic reaction though confounded by empiric epipen administration prior to arrival," and "less likely allergic reaction, possible panic attack."

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		Since returning to work, the hospital has granted the plaintiff's requests for medical exemption every year since this incident. Over the course of her employment, the plaintiff has indicated on various forms that she had not had "any serious problems with shortness of breath, wheezing, or chest pain, that she had no known allergies, and that she was not disabled." Plaintiff filed suit against the hospital arguing that the employer "failed to reasonably accommodate her disability by not allowing her to wear a face mask during the 2017 flu season in lieu of receiving a flu vaccine." The district court found that, "even assuming Plaintiff's allergy to the flu vaccine constitutes an impairment that limits the major life activity of breathing, she has nevertheless failed to show that this impairment substantially limited her breathing at the time she sought an accommodation, and as such, it cannot be said that Plaintiff had a qualifying disability that Defendant failed to accommodate." The court made clear that while "some reactions to vaccines can be severe enough in intensity, duration, frequency, or after-effects to rise to the level of a disability under the ADA," on the record before the court, "no reasonable factfinder could conclude that Plaintiff's reactions to the flu vaccine, at the time she requested an accommodation, meet the definition of a disability."
Brown v. Children's Hosp. of Philadelphia Case No. 18-2363 (E.D. Pa. Nov. 9, 2018) Related decisions: 2018 U.S. Dist. LEXIS 191968, 2018 WL 5884545 (E.D. Pa., Nov. 9, 2018), granting the employer's Motion to Dismiss, *aff'd*, 794 F. App'x 226 (3d Cir. 2020) (*reh'g en banc* denied)	12/13/18	*Religious Discrimination (Favorable Employer Outcome)* The hospital employer requires all employees to receive a flu shot. The plaintiff objected to the shot as she "could no longer go against [her] beliefs and obtain the flu shot." The plaintiff further stated that "she did not have a pastor to validate her beliefs" and that she had "proven to remain healthy due to [her] African Holistic Health lifestyle." Her employment was terminated for failure to comply with the employer's flu shot mandate. The district court dismissed the employee's claim for failure to allege sufficient facts to support the requisite elements of a Title VII religious discrimination claim. The district court held that the employee failed to identify a sincerely held religious belief that conflicted with the employer's flu shot policy. The Third Circuit affirmed the district court's order dismissing plaintiff's complaint, holding that the employee's "concern that the flu vaccine may do more harm than good" and claims that a vaccine was unnecessary because she had "proven to remain healthy due to [her] African Holistic Health lifestyle" constituted a medical, rather than religious, belief.
Horvath v. City of Leander Case No. 1:17-CV-256-RP (W.D. Tex. Oct. 10, 2018) Related decisions: 2018 U.S. Dist. LEXIS 236718, 2018 WL 10771965 (W.D. Tex. Oct. 10, 2018), granting Summary Judgment in favor of the employer, *aff'd*, 946 F. 3d. 787 (5th Cir. 2020)	3/31/2017	*Religious Discrimination (Favorable Employer Outcome)* A driver/pump operator for a fire department refused a TDAP vaccine on religious grounds. As an accommodation, the employer offered the employee a different position with no public contact or requiring the employee to wear PPE, including an N95 mask, at all times while on duty. The employee refused to be moved to a different position and objected to wearing the N95 respirator at all times. The employee instead proposed to wear the respirator "when encountering patients who are coughing or who have a history of communicable illness." The employer reiterated its proposed accommodations, and the employee refused again. The employee's job was terminated. The district court ruled in favor of the employer granting summary judgment because the employer offered two reasonable accommodations and there was no evidence of discriminatory animus on the employer's part. In affirming summary judgment for the employer, the Fifth Circuit held that the employer reasonably accommodated by offering two accommodation options: (1) reassignment to a different position, "which offered the same pay and benefits and did not require a vaccine," and (2) remaining in the same position if the employee "agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature." The court, however, sidestepped the issue of whether mandating the use of a respirator at all times was itself a reasonable accommodation, stating: "Because we determine that the City offered [Plaintiff] a reasonable accommodation by allowing him to transfer positions, we do not consider whether the City's second accommodation option, which involved wearing a respirator mask for twenty-four-hour periods, was reasonable, or if [Plaintiff's] request for a religious exemption created an undue hardship."

Applicable Case	Date Complaint Filed	Nature of Claim and Outcome
Ruggiero v. Mount Nittany Med. Ctr. Case No. 4:16-CV-01996 Related decisions: 2017 U.S. Dist. LEXIS 73546 (M.D. Pa. May 15, 2017), granting the employer's Motion to Dismiss, *rev'd*, 736 F. App'x 35 (3d Cir. 2018), holding that Plaintiff's allegations were sufficient to survive a Motion to Dismiss	9/30/2016	*Disability Discrimination (Settled With Mixed Results)* Plaintiff, who suffered from "severe anxiety and eosinophilic esophagitis, which limit her ability to perform certain life activities," sought an exemption to the employer's mandate that all clinical employees received a vaccine for tetanus, diphtheria, and pertussis (the "TDAP vaccine"). Plaintiff submitted a doctor's note to her employer, which in part read that the plaintiff was "medically exempt from receiving the Tdap immunization due to severe anxiety with some side effects she read with this injection." The employer denied the plaintiff's request for an exemption as the request did not "meet the definition of medical contraindication as detailed in the manufacturer's vaccine literature." Plaintiff suggested wearing a mask as a possible accommodation—an accommodation offered to other nurses. Ultimately, the plaintiff did not receive the Tdap vaccine and her job was terminated. The district court held that the plaintiff had failed to allege the employer was on notice of her "alleged disability and request for an accommodation." The court further held that the employer had also "satisfied its obligations under the good faith interactive process as a matter of law when it notified [Plaintiff] that it would exempt her from vaccination if she suffered from any of the contraindications, warnings, or precautions identified by the manufacturer." Reversing the district court's ruling, the appellate court held that "[a]though the issue is close," the plaintiff's "allegations are sufficient to survive a motion to dismiss." The appellate court held that "the facts alleged in the complaint plausibly suggest that [the employer] knew of [Plaintiff's] alleged disability and her desire for an accommodation," and failed to engage in the interactive process. The court also held that the plaintiff's "termination may provide an inference of discrimination when considered alongside her allegation that other MNMC employees were allowed to not have the TDAP vaccine and remain employed." The appellate court remanded the case to the district court where the parties settled via consent decree.
EEOC v. St. Vincent Hospital and Health Center, Inc. Case No. 16-CV-00234 (W.D. Pa. Jan. 5, 2017)	9/22/16	*Religious Discrimination (Settled With Mixed Results)* A hospital employer maintained a mandatory vaccination policy, requiring employees to get the influenza vaccine annually. To qualify for a religious-based exemption under the employer's policy, the employee would need to provide a certification from a clergy person or another third party demonstrating that the employee practices a religion where influenza vaccination "is contraindicated according to doctrine or accepted religious practices." The employer also required that individuals exempted from the policy wear a face mask when in direct patient contact during flu season. The EEOC filed suit against employer on behalf of six employees who did not get the certifications required by the employer to be exempted from the employer's policy. The case was settled via consent decree. The employer agree to apply Title VII's concepts of "religion" and "undue hardship" and not require clergy certification or other proof that the employee's belief is "official endorsed teaching of any particular religion or denomination."

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EEOC v. Baystate Med. Ctr. Case No. 3:16-cv-30086 (D. Mass. Oct. 30, 2017)	6/6/16	*Religious Discrimination (Favorable Employer Outcome)* An employer maintained an influenza immunization policy that required all of its employees to receive an annual flu vaccination. Under this policy, any employee who declines to be vaccinated, for any reason, must wear a mask at all times while working within the employer's facilities. An employee refused vaccination based on her Christian faith and her belief that "her body is a temple." The employee wore a mask at work but began to wear her mask improperly, pulling it away from her face when she experienced difficulties communicating with others. The employee's position did not require her to have patient contact or to work in areas where patients were seen and treated. The employer terminated her employment for failing to wear a mask as required by the employer's influenza policy. The EEOC filed suit against the employer on the basis of religious discrimination. The district court granted summary judgment in favor of the employer. The court found that because the employer's influenza policy gave employees two options to choose from—the vaccination or wearing a mask—the mask was itself the employment requirement for which the employee was terminated, and not an accommodation to the vaccination requirement. Thus, the court found that the employee's claims failed as a matter of law because "there was no conflict between this employment requirement and her religion, nor was her religion the basis for the adverse employment action."
EEOC v. Mission Hosp., Inc. Case No. 16-cv-00118-MOC-DLH (W.D.N.C., Aug. 7, 2017) Related decisions: 2017 U.S. Dist. LEXIS 124183, 2017 WL 3392783 (W.D.N.C. Aug. 7, 2017), denying the employer's Motion for Summary Judgment	4/28/16	*Religious Discrimination (Favorable EEOC Outcome and Settled With Mixed Results)* A hospital employer had an immunization policy that required employees to receive a flu vaccination annually, by December 1 of each year. The policy also required that employees seeking a religious exemption to the vaccine make a request for exemption by September 1. The EEOC brought suit against the employer on behalf of three employees who were denied the religious exemption due to submitting requests after the hospital's September 1 deadline. One employee believed that "our bodies are a temple and that God gave us dominion over our bodies" and that "injecting the flu vaccine into her body is morally wrong." Another believed that "followers of her religion are healed by plants, fruits, and grains." The third believed that "injecting chemicals and diseases into her veins is not something God intends and that it is wrong." The district court denied the employer's motion for summary judgment. The court held that three employees with the unconventional beliefs had "bona fide" religious reasons for requesting exemptions and that "a reasonable jury could find that the defendant was treating individuals differently" due to the fact that the employer allowed employees who did not meet the December 1 deadline a "grace period" but did not afford a similar grace period to those who failed to meet the exemption's September 1 deadline. The case settled via consent decree. The hospital employer agreed to pay $89,000 to the employees, change all references to termination in the three employees' personnel files to "voluntarily resigned," and provide the three employees with positive letters of recommendation. The hospital also agreed to remove its September 1 deadline for religious and medical exemptions, provide a deadline consistent with CDC recommendations, allow for requests for exemptions to be made up until the deadline for receiving the flu vaccine, and allow the same grace period for medical and religious exemptions as for receiving the flu vaccine.

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Hustvet v. Allina Health System Case No.16-CV-00551 (D. Minn. 2017) Related decisions: 283 F. Supp. 3d 734 (D. Minn. 2017), granting summary judgment in favor of the employer, *aff'd*, 910 F.3d 399 (8th Cir. 2018)	3/3/16	*Disability Discrimination (Favorable Employer Outcome)* The hospital employer required employees to have various immunities, including to rubella. An employee who worked with "fragile and immune-compromised" clients did not have immunity to rubella and she refused to take the MMR vaccine because of her concerns that she "had severe cases of mumps and measles—the MM part of the MMR" and that she had "many allergies and chemical sensitivities, such that she needed to limit her exposure." The employee wished to take a rubella-only vaccine and not the MMR vaccine, but such a vaccine is not available in the United States. The employee's job was terminated for failing to comply with the employer's immunization policy. The employee sued the employer on the basis of disability discrimination, unlawful inquiry, and retaliation. The district court granted summary judgment for the employer. The district court dismissed the plaintiff's disability discrimination claim, finding that the plaintiff failed to meet her burden to show that she was disabled, as there was insufficient evidence in the record to establish that her conditions substantially limited her ability to perform major life activities. The court also found that a reasonable jury could not find that the plaintiff's claimed limitations are causally related to her concerns about taking the MMR vaccine, as there was no evidence that the plaintiff had severe allergies to any of the vaccine's components. The district court also granted summary judgment on the plaintiff's unlawful inquiry claims, finding that the plaintiff was willing to undergo the examination, and thus her failure to complete the examination did not cause her job termination. The district court also granted summary judgment to the plaintiff's retaliation claim, finding that she failed to show she engaged in protected conduct by objecting to the requirement that she have immunity to rubella and that even if it were protected conduct, it did not cause her dismissal. The Eighth Circuit affirmed summary judgment, finding that the plaintiff's record reveals that she has "garden-variety allergies," which is not enough for "reasonable fact-finder to conclude she is disabled." The appellate court also upheld summary judgment on the unlawful inquiry claim finding that that the hospital's "decision to force a class of employees (those employees with client contact who merged into the company) to undergo a health screen was job related and consistent with business necessity" and "no more intrusive than necessary." The appellate court also upheld summary judgment on the retaliation claim because the plaintiff did not establish that the employer terminated her employment because she *requested* the accommodation. Rather, the employer terminated her "because her job required her to work with potentially vulnerable clients "and she refused to comply with the immunization policy. The appellate court found that the plaintiff did not establish evidence that this legitimate, non-discriminatory reason was pretext.
Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania Case No. 2-16-CV-00834 (E.D. Pa. 2016) Related decisions: 200 F. Supp. 3d 553 (E.D. Pa. 2016), granting the employer's Motion to Dismiss, *aff'd*, 877 F. 3d 487 (3d Cir. 2017)	2/22/16	*Religious Discrimination (Favorable Employer Outcome)* A medical center employer required employees to be vaccinated against the flu. Employees who received religious or medical exemptions would be required to wear masks. One employee submitted requests for exemptions "on the basis of a strong moral or ethical conviction similar to a religious belief." He was granted exemptions in 2012 and 2013. However, in 2014 the employer informed the employee that it was changing its policies and asked the employee to provide a letter on official clergy letterhead supporting the exemption request. The employee did not obtain such a letter and instead submitted his exemption request with a lengthy essay detailing his beliefs that the influenza vaccine is ineffective and that his "conscience" compelled him to refuse the vaccine. The employee's job was terminated for his refusing the flu vaccination. The district court held that the plaintiff's "stated opposition to vaccinations [was] entirely personal, political, sociological and economic—the very definition of secular philosophy as opposed to religious orientation," and thus the plaintiff did not state a claim for religious discrimination under Title VII. The Third Circuit affirmed the district court's dismissal, holding that the employee's objection to the vaccination, made on the basis of his belief that "one should not harm their own body and [his strong belief] that the flu vaccine may do more harm than good," was "a medical belief, not a religious one," and thus Title VII did not apply.

Applicable Case	Date Complaint Filed	Nature of Claim and Outcome
Aiken v. Methodist Healthcare Memphis Hospitals Case No. 14-02641 (W.D. Tenn. Jan. 13, 2015)	8/19/14	*Religious Discrimination (Settled With Mixed Results)* The employer implemented a mandatory flu vaccination policy for all employees working at its facility. The policy notified employees to either receive the vaccine or "provide written documentation from a physician or religious advisor." Under the policy, exempted employees must wear a surgical mask during flu season. The plaintiff objected to taking the vaccine due to her belief that the vaccines' manufacturing process used "aborted fetal cell lines" in violation of her Christian beliefs. The plaintiff also stated that she "objected to taking the flu vaccine due to the documented risks associated with the vaccine and its unproven safety in pregnant women." The employer allegedly asked the plaintiff to have a religious leader or physician sign off on exemption form, which she did not provide. The plaintiff's job was then terminated for failure to comply with the mandatory flu vaccination policy. The plaintiff filed suit arguing that the employer failed to provide her a reasonable accommodation and failed to engage in the interactive process with her. The parties settled the matter before it could be decided.
Delgado v. Fulton-DeKalb Hospital Authority Case No. 14-CV-01978 (N.D. Ga. Mar. 31, 2015)	6/24/14	*Religious Discrimination (Settled With Mixed Results)* The hospital employer required employees to be annually vaccinated against influenza. The plaintiff submitted a request for a religious exemption on the basis of her belief that her "religious tenets prohibit invasive medical procedures such as vaccinations" and that "the injection of toxic chemicals and foreign proteins into the bloodstream is a violation of God's directive to keep the body/temple holy and free from impurities." The hospital denied her request, allegedly on the basis that her beliefs were incorrect. The plaintiff also alleged that she was subject to harassment for not following the vaccine mandate. The parties settled the matter before it could be decided.
Robinson v. Children's Hospital Boston Case No. 14-10263 (D. Mass. 2016) Related decisions: 2016 U.S. Dist. LEXIS 46024, 2016 WL 1337255 (D. Mass. Apr. 5, 2016), granting summary judgment in favor of the employer. Appealed, 16-01495, Terminated	2/4/14	*Disability Discrimination (Favorable Employer Outcome)* Due to the hospital's highly vulnerably patient population of "some of the most critically ill infants, children, and adolescents in the world" and the Massachusetts Department of Public Health's strong encouragement of vaccination of hospital personnel, the hospital employer decided to require all employees who "work in or access patient-care areas to be vaccinated against the influenza virus to achieve the safest possible environment and to ensure the highest possible care for its patients." The policy only allowed for exemptions for medical reasons, not religious, because the hospital "concluded that additional exemptions would increase the risk of transmission." The hospital did provide accommodations to those with religious concerns to receive a pork-free (gelatin-free) vaccine. The plaintiff's duties required patient interaction and was thus required to be vaccinated under the hospital's policies. The plaintiff refused to be vaccinated on the basis of her religion. The plaintiff believed "many vaccines [were] contaminated" with pork byproduct and "did not feel comfortable receiving the influenza vaccine." The hospital offered the plaintiff a non-gelatin vaccine, but the plaintiff declined it. On the day of the deadline for compliance with the policy, the plaintiff informed the hospital that he had previous had a bad allergic reaction to an influenza vaccine. The hospital encouraged the plaintiff "to seek a medical exemption and granted her a temporary medical exemption while it reviewed her medical records" on the basis of her claimed allergy to the injection, and assisted the employee in looking for another position in an area of the hospital with no patient interaction. The plaintiff was unable to find another position and her position was eventually terminated. The hospital treated this termination "as a voluntary resignation, which left her eligible to re-apply for other Hospital positions in the future." The district court granted summary judgment for the employer hospital, finding that the hospital worked with the plaintiff "several times" to find a reasonable accommodation. The district court also found that exempting the employee from the vaccination would constitute an undue hardship because of the risk to the hospital's vulnerable patient population.

Applicable Case	Date Complaint Filed	Nature of Claim and Outcome
Good v. Coshocton County Memorial Hospital Association Case No. 14-00001 (S.D. Ohio Oct. 28, 2014)	1/2/14	*Religious Discrimination (Settled With Mixed Results)* The employer implemented a mandatory flu vaccination policy with exemptions permitted for medical or religious reasons. To obtain a religious exemption, employees must provide a form signed by the employee's clergyperson and include a statement about the nature of the religious objection. The plaintiff filed a request in 2012, which was granted. As an accommodation, the plaintiff wore a mask at all times during flu season. In 2013, the plaintiff alleges she made a similar request for exemption on religious grounds, which was denied. The plaintiff alleges she offered to wear a mask at all times at work as an accommodation, which was also denied. The plaintiff's job was terminated for her failure to follow the vaccination policy. The parties settled the matter before it could be decided.
Bashista v. St. Joseph Hospital System Case No. 14-10001 (E.D. Mich. Aug. 22, 2014) Related decisions: 2014 U.S. Dist. LEXIS 117697, 2014 WL 4206891 (E.D. Mich. Aug. 22, 2014), granting the employer's Motion to Dismiss	1/1/14	*Religious Discrimination (Favorable Employer Outcome)* The plaintiff's job was terminated for refusing a mandatory flu shot on unspecified religious grounds and their belief that the flu "shot is experimental." The plaintiff brought suit against the hospital employer as well as the CDC and the State of Michigan Department of Community Health (DCH). The plaintiff's complaint contained many conclusory allegations. The district court granted the employer's Motion to Dismiss because the plaintiff failed to plead their claim properly on multiple fronts. The court dismissed the claims against the CDC and DCH under the doctrine of sovereign immunity, as well as because of the lack of employment relationship between these agencies and the plaintiff. The court also dismissed the claim against the employer because the plaintiff had not pled any element of their claim in their complaint or in their response briefing.
Lemieux-Lewis v. Hartford Healthcare Corporation Case No. 13-cv-01865 (D. Conn. Mar. 9, 2015)	12/17/13	*Religious Discrimination (Settled With Mixed Results)* The plaintiff worked as an accountant at a medical facility. She alleges she did not work in patient treatment and had very limited contact with patients. The employer implemented a policy mandating that all employees receive the flu vaccine. The policy allowed for religious and medical exemption but stated that employees would have color-coded ID badge tags indicating their "vaccination status." Exempt employees would also have to wear a mask whenever within six feet of an area a patient may be. The plaintiff received a religious exemption to the vaccine mandate, and was required to wear a color-coded ID badge indicating her exempt status. The plaintiff filed suit arguing that the color-coded ID badge and having to wear a mask constituted religious discrimination because it identified her as someone needing a religious exemption and "highlighted her religious beliefs unnecessarily." The parties settled the matter before it could be decided.
Usack v. Mountain States Health Alliance Case No. 13-CV-00278 (E.D. Tenn. Aug. 15, 2014)	10/21/13	*Religious Discrimination (Settled)* A health care employer required employers to receive the influenza vaccine. In order to receive a religious exemption, employees must fill out a form provided by the employer and attach a letter from a religious authority. The plaintiff was a nurse who refused to take the vaccine based on her "personally held and/or philosophical objections," which were beliefs held "outside of belonging to" an organized church or having a state certified religious leader. Specifically, the plaintiff stated on the exemption form that she had "objections to vaccinations, in general, based on [her] personal religious beliefs and [her] relationship with God." The plaintiff alleges she was terminated for her refusal to take the flu vaccine. The parties settled the matter before it could be decided.
Chenzira v. Cincinnati Children's Hospital Medical Center Case No. 1:11-cv-00917 (S.D. Ohio 2012) Related decisions: 2012 U.S. Dist. LEXIS 182139, 2012 WL 6721098 (S.D. Ohio Dec. 27, 2012), denying the employer's Motion to Dismiss in part such that the religious discrimination claims survive	12/28/11	*Religious Discrimination (Favorable Employee Outcome and Settled With Mixed Results)* The plaintiff's employment was terminated for failing to comply with the employer's vaccination policy. The plaintiff contends that the termination "violated her religious and philosophical convictions because she is a vegan, a person who does not ingest any animal or animal by-products." The plaintiff contends that "her practice constitutes a moral and ethical belief which is sincerely held with the strength of traditional religious views." The district court denied the employer's Motion to Dismiss in order to afford the employee the opportunity to prove that the employee's veganism constituted a religious belief, because the court found it "plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views." The parties ultimately settled the matter in mediation before it could be decided.

Applicable Case	Date Complaint Filed	Nature of Claim and Outcome
Edwards v. Elmhurst Hospital Center Case No. 11 CV 4693 (E.D.N.Y. 2013) Related decisions: 2013 U.S. Dist. LEXIS 31083, 2013 WL 839535 (E.D.N.Y. Feb. 15, 2013), Magistrate judge recommendation that the court grant the employer's Motion to Dismiss; 2013 U.S. Dist. LEXIS 31082 (E.D.N.Y. Mar. 6, 2013), granting the employer's Motion to Dismiss with prejudice	9/26/11	*Disability Discrimination (Favorable Employer Outcome)* The plaintiff, a health care worker, was required by the New York State Department of Health to receive a flu vaccination as a condition of his employment. The plaintiff objected to the vaccination on the basis of his religious beliefs as a Jehovah's Witness. The plaintiff alleged that the employer informed him that it would terminate his employment if he refused the vaccine. Consequently, the plaintiff filed suit. The district court dismissed the employee's claim because he failed to allege any adverse employment action for his refusal of the influenza vaccination. The district court also noted that the plaintiff's allegations satisfied the first two prongs of the *prima facie* test—namely that the plaintiff had a "bona fide religious belief conflicting with an employment requirement" and that he had informed his employer of his belief.

Appendix B – EEOC Consent Decrees, Conciliation Agreements and Judgments[738]

Select EEOC Settlements in FY 2020-2021[739]

Settlement Amount	Claim	Description	Court	EEOC Press Release
$20.5 million	Race Discrimination Sex Discrimination Retaliation	EEOC alleged the company tolerated a work environment hostile to female and Black employees, and discriminated against them on the basis of pay and career advancement. The EEOC also alleged the company retaliated against employees who filed charges of discrimination with the EEOC or otherwise opposed discrimination. In one instance, the company purportedly fired a vice president who refused to give a negative evaluation and a disciplinary warning to two Black female employees who had complained. Under the terms of the four-year consent decree, the company will pay $20,500,000 to 21 former employees, and refrain from engaging in future violations of Title VII. The company also agreed to designate an employee as an Internal Compliance Monitor and retain an outside consultant to review its EEO policies, promotion and compensation practices and data, and future complaints of discrimination, harassment, and retaliation. The company will train employees on discrimination, harassment, and retaliation, and rate its managers and supervisors on their compliance with the company's EEO policies and laws prohibiting discrimination and retaliation.	U.S. District Court for the District of Colorado	*1/9/2020*
$20 million	Sex Discrimination	The EEOC alleged the defendant subjected charging parties and a nationwide class of job applicants to a physical ability test that has a disparate impact on female applicants. Under the terms of the two-year consent decree, the defendant agreed to pay $20 million to 12,000 individuals, and discontinue use of its physical abilities test. In addition, the company will maintain a centralized record of sex bias complaints, and provide training.	U.S. District Court for the Eastern District of Kentucky	*9/10/2020*
$10 million	Age Discrimination	The EEOC alleges the defendant systemically laid off employees over the age of 40 in favor of retaining younger employees. The complaint also alleges that older employees were passed over for rehire in favor of less-qualified, younger employees. Under the terms of the three-year consent decree, the defendant will provide $10 million in monetary relief to 45 claimants, retain an EEO monitor, a diversity director and a layoff coordinator to monitor compliance with the ADEA and this decree, and ensure that it takes no further action that has a disparate impact on employees in the protected age group. The defendant agreed to review and, if necessary, revise policies and procedures against all discrimination under the ADEA. The defendant also agreed to provide training to all employees on age discrimination and report to the EEOC on recruitment, hiring, layoffs, terminations and complaints about age discrimination, along with the monitoring of such complaints to prevent retaliation. The EEOC will monitor compliance with this agreement.	U.S. District Court for the Central District of California	*6/11/2020*

738 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2020 and the early months of FY 2021. The significant consent decrees and conciliation agreements in Appendix B include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. Appendix B also includes notable jury verdicts and judgments.

739 Included in this appendix are high-dollar conciliation and consent decrees entered into during FY 2020 and early FY 2021. FY 2021 settlements are marked with an asterisk (*).

Settlement Amount	Claim	Description	Court	EEOC Press Release
$6 million	Race Discrimination	The EEOC alleged a retailer discriminated against a class of employees based on race. Specifically, the EEOC claimed the defendant denied employment of Black applicants at a higher rate than White applicants based on the employer's use of criminal background screening. Under the terms of the three-year consent decree, the defendant will pay $6 million into a settlement fund to be distributed through a claims process approximately 10,000 Black applicants who were not hired between 2004 and 2019. If the retailer opts to continue using criminal background screening, it must hire a criminology consultant to develop a new criminal background screening process based on several factors, including the time since conviction, the number of offenses, the nature and gravity of the offense(s), and the risk of recidivism. Until such time, the company is precluded from using criminal background screening in its hiring process. The company is also prevented from discouraging applicants with criminal records.	U.S. District Court for the Northern District of Illinois	*11/18/2019*
$5.4 million	Age Discrimination	The EEOC alleged Baltimore County engaged in age discrimination by forcing employees hired at older ages to pay more for their pension benefits. The county maintains a defined benefit pension plan based in part on employee contributions deducted from each paycheck. Under the county code, employee contribution rates were based on age at entry into the retirement system, with older employees paying higher rates than younger members for the same benefits. This case ran for over a decade. In 2012, the district court granted partial summary judgment for the EEOC, ruling that the county's pension plan was facially discriminatory and not justified by financial considerations, thus violating the ADEA. In 2014, the Fourth Circuit affirmed and remanded for further proceedings to address the issue of damages. In 2016, the parties resolved the EEOC's claims for injunctive relief through a joint order under which the county eliminated age-based contribution rates. In 2016, the district court determined that no monetary relief was appropriate. In 2018, the Fourth Circuit reversed and remanded, however, holding that "a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability." In October 2019, the district court ordered that the EEOC could recover back pay accruing between March 2006 and April 2016, for eligible class members. Under the consent order resolving this lawsuit, the county will pay approximately $5.4 million to more than 2,000 retirees.	U.S. District Court for the District of Maryland, Northern Division	*4/24/2020*
$4.4 million	Sexual Harassment Retaliation	The EEOC filed a Commissioner's Charge of sex discrimination against the company. Specifically, the EEOC alleged the company permitted a culture of sexual harassment and retaliated against those who complained. Under the terms of the conciliation agreement, the company will pay $4.4 million to individuals the EEOC determines experienced sexual harassment and/or retaliation. The company will also establish a means for identifying employees who have been the subject of more than one harassment complaint, update its policies, and continue conducting exit interviews with an eye towards harassment and retaliation issues. The company has also consented to third-party monitoring for a three-year period to ensure it adheres to the terms of the agreement.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*12/18/2019*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$3.3 million	Disability Discrimination	The EEOC alleged that the defendant denied deaf and hard-of-hearing employees reasonable accommodations and that it discriminated against deaf and hard-of-hearing applicants. Under the terms of the two-year consent decree to resolve claims of systemic, nationwide discrimination, the defendant will pay $3.3 million to 229 individuals. The decree also requires the defendant to provide deaf and hard-of-hearing employees with access to live and video remote American Sign Language interpreting, captioned videos, and scanning equipment with non-audible cues such as vibration. The defendant will also take steps to protect the safety of deaf and hard-of-hearing package handlers by ensuring that all tuggers, forklifts and similar motorized equipment have visual warning lights, and providing personal notification devices to alert deaf package handlers of an emergency. The defendant will also train managers and human resources representatives on ADA compliance and create written resources to assist them in identifying and providing accommodations for deaf and hard-of-hearing package handlers. A company official will oversee the company's implementation of the consent decree and reporting to the EEOC.	U.S. District Court for the Western District of Pennsylvania	*5/19/2020*
$2.65 million	Disability Discrimination	The EEOC alleged a company discriminated on the basis of disability by allowing employees who prepared and served food samples to customers to sit on stools for no more than 10 minutes only every two hours regardless of medical conditions or restrictions. Under the terms of the 4.5-year consent decree, the employer will pay $2.65 million to over 200 former employees, designate ADA coordinators to address requests for accommodation, revise its disability discrimination and reasonable accommodation policies, provide training, and establish a toll-free number through which employees can obtain more information about requests for accommodation.	U.S. District Court for the Southern District of Illinois	*11/21/2019*
$2.625 million	National Origin Discrimination	The EEOC alleged the defendant engaged in national origin discrimination by subjecting Hispanic banquet staff to a hostile work environment and retaliating against workers who opposed the English-only language policy. Under the terms of the two-year consent decree, the defendant will pay $2,625,000 to 26 individuals, post a notice of intent to comply with Title VII, provide training, and revise its language policy.	U.S. District Court for the Western District of Texas	*10/31/2019*
$2.5 million	Disability Discrimination	The EEOC alleged a railroad company's medical department unlawfully disqualified workers from employment based on a range of actual or perceived disabilities, or a history of such disabilities, disclosed during pre-employment or return-to-work medical evaluations. The EEOC claimed the company engaged in a practice of medically disqualifying workers without proper consideration of whether, or to what extent, their conditions might affect their ability to perform the jobs safely. Under the terms of the 2.5-year consent decree, the company will pay $2.5 million to 37 workers. In addition, the decree requires the company to implement measures, such as policies and procedures and training, to prevent workplace disability discrimination stemming from medical evaluations. The company has also committed to the appointment of an internal compliance monitor.	U.S. District Court for the Western District of Pennsylvania	*7/28/2020*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2 million	Disability Discrimination	The EEOC alleged the defendant and its affiliates failed to provide accommodations for employees with disabilities. According to the EEOC's lawsuit, the defendant had policies requiring employees to perform 100% of job duties without restriction, accommodation, or engaging in the interactive process. The EEOC further charged that defendant and its affiliates discharged employees with disabilities pursuant to inflexible leave policies. Under the five-year consent decree, the defendant will provide $2 million in monetary relief, retain an external equal employment opportunity monitor to review and revise its policies and procedures regarding ADA compliance and to ensure that defendant engages in the interactive process and provides reasonable accommodations. The companies also agreed to provide training and to designate coordinators to handle disability accommodation requests and disability discrimination complaints.	U.S. District Court for the Eastern District of California	*2/20/2020*
$1.25 million	Disability Discrimination	The EEOC claimed the company engaged in disability discrimination by using an online application process. Under the terms of the conciliation agreement, the company will pay $1.25 million to the original charging party and other aggrieved applicants who claimed they were denied employment opportunities due to the alleged discriminatory online application process. Going forward, the company will include on its applications a prominent statement regarding its willingness to provide required reasonable accommodations and directions on how to request such accommodations during the application process. The company will also retain an outside consultant to conduct a job analysis and validity study to evaluate and revise its online assessment to ensure that questions asked on the application relate to the job. In addition, the company will designate a compliance officer that will provide training and monitor its application process to ensure compliance with the ADA.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*10/9/2019*
$1.25 million	Racial Harassment	According to the EEOC, an electrical subcontractor engaged in race discrimination against eight employees. The alleged harassment included racist graffiti and epithets drawn on the walls of the portable toilets at the construction site, as well as a noose at the worksite with threats of lynching. The EEOC further alleges the company failed to act when two Black employees claimed a White coworker taunted them with racial pejoratives. Under the terms of the consent decree, which will stay in effect through December 2022, the company will pay $1.25 million in compensatory damages to the eight former employees, hire an EEO consultant to help implement the decree's terms, review company policies, and provide anti-discrimination training. In addition, the company agreed to work with the EEO consultant to develop policies and procedures to facilitate discussions with potential subcontractors, general contractors and unions about how to best monitor, prevent and remedy harassment at job sites and to develop proposals to incorporate such terms into contracts.	U.S. District Court for the Northern District of California	*8/21/2020*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.2 million	Race Discrimination Racial Harassment Retaliation	The EEOC alleged two oil field services companies discriminated against Black employees by creating a hostile work environment and retaliating against those who complained about the harassment. The EEOC also claimed the company's managers intentionally assigned Black employees to lower-paying jobs. Under the terms of the two-year consent decree, the company will pay $1,225,000 to nine Black employees and one of their White co-workers who complained about discrimination. The company will also provide training to employees, and revise its policies regarding race discrimination, harassment, and retaliation.	U.S. District Court for the Western District of Texas	*11/12/2019*
$950,000	National Origin Discrimination Race Discrimination	The EEOC alleged a beverage distributor offered sales employees account and territory assignments that resulted in race and/or national origin discrimination. Under the terms of the settlement, the company will pay $950,000 to those affected and take proactive steps to prevent discriminatory assignments. In addition, the company will conduct anti-discrimination training, put in place systems to further encourage diverse applicants to apply for open positions, revise its anti-discrimination policy to expressly reference that it prohibits segregating or making assignments based on race and/or national origin and distribute the revised policy to its employees, and hire a monitor to track the demographics of employees applying for and receiving offers for specified Illinois sales positions. The company also agreed, for a two-year period, to periodically report to the EEOC on the demographics of its sales force.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*10/23/2019*
$900,000*	Race Discrimination	The EEOC alleged the defendant failed to post supervisory and management positions at its retail locations nationwide and failed to promote Black employees into those positions. In addition to providing $900,000 in back pay and compensatory damages to those unlawfully denied promotions, the company has agreed, under the two-year consent decree, to revise its job-posting process, reach out to historically Black colleges and universities for recruitment purposes, develop and post written promotion policies for its stores nationwide, post supervisor and manager vacancies, provide anti-discrimination training, and create a dedicated email address and telephone number for reporting failure-to-promote complaints.	U.S. District Court for the Eastern District of Arkansas	*10/9/2020*
$825,000	Disability Discrimination	The EEOC alleges a manufacturer of automobile seat frames screened its predecessor's former employees and failed to hire 15 of them based on the number of sick or FMLA days they had taken. Under the terms of the two-year consent decree, the defendant will pay $825,000 in monetary relief, and refrain from discriminating against any applicant or employee due to a disability. The defendant must also post a written notice to applicants and employees of their rights under the ADA, provide annual training to all hiring and human resources personnel at the company's Madison, Mississippi facility, and develop and properly communicate company policies designed to ensure a discrimination-free workplace.	U.S. District Court for the Northern District of Mississippi	*5/13/2020*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$800,000	Disability Discrimination	According to the EEOC's lawsuit, the defendant denied employees with disabilities reasonable accommodation, failed to engage in the interactive process, and instead fired them. Specifically, the EEOC claimed the defendant maintained inflexible leave and attendance policies that did not allow additional leave as a reasonable accommodation for employees with disabilities. Under the terms of the three-year consent decree, the defendant has agreed to pay $800,000 as well as engage an EEO monitor to conduct regular audits, monitor compliance, and oversee recordkeeping and reporting requirements. The defendant also agreed to review and revise its ADA policies, provide regular training on the ADA, and maintain data on accommodation requests and complaints.	U.S. District Court for the District of Hawaii	*10/2/2020*
$750,000	Race Discrimination Racial Harassment Retaliation	The EEOC alleged the company engaged in an ongoing pattern or practice of race discrimination against Black job applicants. The company purportedly failed to hire Black applicants for certain positions. In addition, district managers allegedly used racial slurs against a Black supervisor. Under the terms of the 30-month consent decree, the company agreed to pay $750,000 to the supervisor and other claimants; designate an internal monitor to ensure compliance with the consent decree; implement a targeted hiring plan, including tracking the number and race of applicants, and reason(s) why they are not hired; create an anti-harassment and retaliation policy; provide training on preventing discrimination, harassment and retaliation; post a notice regarding the settlement; and report to the EEOC on how it investigates and handles any future complaints of race discrimination in hiring.	U.S. District Court for the District of Maryland	*11/22/2019*
$700,000*	Age Discrimination	EEOC alleged the employer targeted employees age 40 and older in a series of nationwide layoffs. Under the terms of the two-year consent decree, the employer has agreed to pay $700,000 to affected employees. In addition, the defendant's parent company must issue a statement to all employees that age discrimination will not be tolerated. The company also agreed to review and revise its layoff policies and procedures.	U.S. District Court for the Southern District of New York	*12/11/2020*
$650,000	Age and Disability Discrimination	The EEOC alleged an oil and gas drilling contractor hired the charging party as a rig hand before forcing him to undergo an unlawful medical exam and then fired him based on health information it obtained from the exam. The EEOC also alleged the defendant rejected applicants who were older than 40 because of their age. Under the terms of the consent decree, the defendant will pay $650,000 to the charging party and up to 484 applicants for whom the EEOC sought relief in the lawsuit. The defendant liquidated and ceased all business operations in late 2019.	U.S. District Court for the Western District of Oklahoma	*4/29/2020*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$570,000	Sexual Harassment	The EEOC alleged two resorts engaged in sexual harassment. According to the lawsuit, female employees at both affiliated resorts suffered lewd sexual comments and propositions and inappropriate touching and groping by the owner. Under the five-year consent decree, the defendant agreed to pay $570,000 in damages to a group of six former employees, and will provide policies and training to prevent discrimination and harassment, hire a consultant to investigate any complaints of harassment or retaliation and to conduct individualized training for the owner and general manager. The EEOC will review reports and monitor the workplace to ensure compliance with the decree. A similar lawsuit against the defendant settled in 2008 for $470,000.	U.S. District Court for the Western District of Washington	*4/10/2020*
$568,500	Race Discrimination Sex Discrimination	The EEOC alleged two temporary employment agencies discriminated against Black and female applicants and employees by refusing to send them on work assignments or by sending them for fewer work hours. The EEOC alleged the companies did so on their own accord or per their clients' requests. Under the 2.5-year consent decree, the defendants cannot engage in race or sex discrimination in their referrals or retaliate. The agency will adopt a process to identify qualified applicants or employees for temporary work assignments; inform applicants and employees how to complain of discrimination; create and maintain records of all applicant information; provide periodic reports to the EEOC about its applicants, referrals, and any complaints of race or sex discrimination; and train employees who are involved in the hiring and assignment process about Title VII. The second agency will be required to implement the same measures if/when it resumes operations in the state.	U.S. District Court for the Northern District of Illinois	*6/29/2020*
$537,760	Disability Discrimination	The EEOC alleged an automobile manufacturer failed to hire applicants with disabilities. According to the EEOC's investigation, the employer screened out applicants based on criteria not proven to be job-related and consistent with business necessity, and failed to use the results of the post-offer, pre-employment medical examination. The employer did not admit liability, but agreed to resolve the matter. Under the terms of the conciliation agreement, the employer will pay $537,760, to be allocated to 12 individual charging parties, and to the EEOC to distribute to as-yet-unidentified individuals who may have been affected by the company's policies. The company will also provide written guidance and training to its employees involved in the hiring process.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*10/1/2019*
$500,000*	Sexual Harassment Retaliation	The EEOC alleged an employer sexually harassed and retaliated against a group of employees. Under the conciliation agreement, the employer agreed to pay $500,000 to the affected employees, as well as revise its EEO policies. The company also agreed to put procedures in place for investigating and resolving harassment complaints. As part of the agreement, the employer will hire an external bilingual EEO consultant to provide training and ensure the employer complies with the terms of the conciliation agreement, and notify its customers in writing about its commitment to maintaining a workplace free from discrimination and harassment.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a

Select EEOC Jury Awards or Judgments in FY 2020 and early FY 2021

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$194,748.44	Pay Discrimination	The EEOC alleged a library engaged in pay discrimination by paying a male librarian a higher salary than that paid to female librarians with more experience. The EEOC claimed it paid the male comparator more because of his "unique" prior experience. Following a five-day bench trial, the court disagreed, finding the pay disparity was not justified by a factor other than sex. The court held that the defendants violated the EPA and determined the five claimants were entitled to an award of stipulated back pay and liquidated damages. The liquidated damages award was equal to each claimant's back wage payment.	1:17-cv-02860, in the U.S. District Court for the District of Maryland	*12/29/2020*
$5.2 million (reduced to $323,000)	Disability Discrimination	The EEOC alleged defendant retailer discriminated against an employee with a developmental disability and who is deaf and visually impaired, who performed his job with the assistance of a job coach. The EEOC claimed a new manager suspended the employee's employment and required the resubmission of medical paperwork to continue to work with the accommodation. The defendant countered that the job coach was not merely providing assistance, but instead performing the employee's job. A jury sided with the EEOC and awarded the employee $200,000 in compensatory damages and an additional $5 million in punitive damages. The judge later reduced the punitive damages award to $100,000 to comply with the ADA's damages cap, and added approximately $123,000 in other relief not subject to the damages cap.	l7-cv-739-jdp, U.S. District Court for the Western District of Wisconsin	*10/11/2019*

Appendix C – FY 2020 EEOC Amicus and Appellant Activity[740]

FY 2020 – Appellate Cases Where the EEOC Filed an Amicus Brief

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Our Lady of Guadalupe School v. Morrissey-Berru	U.S. Supreme Court No. 19-267	2/10/2020 (amicus filed) 7/8/2020 (decided)	ADA ADEA	Religion – Ministerial Exception **Result:** Pro-Employer
Background: Former employees of two private Catholic primary schools that provide religious instruction brought federal employment discrimination claims on the basis of age and disability against the schools. The schools moved to dismiss these claims on the grounds that the First Amendment's "ministerial exception" applies, citing the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). The district court dismissed, but the court of appeals reversed. **Issues EEOC is Addressing as Amicus:** Whether the Free Exercise and Establishment Clauses of the U.S. Constitution prevent civil courts from adjudicating employment discrimination claims brought by former employees at religious schools who provided religious instruction. **EEOC's Position:** The Court's decision in *Hosanna-Tabor*, and the purposes of the First Amendment's Religion Clauses, support applying the ministerial exception to any employee of a religious organization who performs an important religious function. In particular, the ministerial exception should apply to any employee who preaches a church's beliefs, teaches its faith, or carries out its religious mission, because the independence of virtually all religious groups depends on the government's avoiding interference in those religious matters. In close cases, facts that demonstrate a religious organization sincerely regards its employee as performing such important religious functions should be dispositive. **Court's Decision:** The Supreme Court held that the First Amendment's Religion Clauses foreclose the adjudication of the teacher's employment discrimination claims.				
Chambers v. DC	U.S. Court of Appeals for the D.C. Circuit No. 19-7098	3/12/2020 (amicus filed)	Title VII	Sex **Result:** Pending
Background: Plaintiff alleged sex discrimination, claiming defendant permitted male employees to transfer to other departments but denied her request based on her sex. The district court granted summary judgment for defendant, reasoning that the denial of a lateral transfer with no change in pay is not an adverse employment action. **Issues EEOC is Addressing as Amicus:** (1) Whether denial of a lateral transfer request involving no diminution in pay or benefits, on the basis of the requesting employee's sex, constitutes discrimination "with respect to compensation, terms, conditions, or privileges of employment" under Title VII **EEOC's Position:** The EEOC argued that all discriminatory job transfers (and discriminatory denials of requested job transfers) are actionable under Title VII. Specifically, the EEOC requested the court hold its decision and any subsequent briefing on the issue until the Supreme Court's disposition of *Forgus v. Esper*, dealing with the same question of law. **Court's Decision:** Pending.				
Daeisadeghi v. Equinox Great Neck, Inc.	U.S. Court of Appeals for the Second Circuit No. 19-506	6/5/2019 (amicus filed) 12/16/2019 (decided)	Title VII	Harassment National Origin **Result:** Pro-Employer
Background: Plaintiff alleged a hostile work environment claim alleging that his supervisors would call him "crazy Persian", "f****** crazy Persian, maniac", and made harassing comments and jokes about his accent and grammar. Plaintiff complained to human resources, but alleged that his supervisors were not disciplined. The district court granted summary judgment to defendant on the ground that the frequency and severity of the incidents were not sufficient to create a hostile work environment. The district court noted that many of the comments were not based on plaintiff's race or national origin and that the alleged harassers would frequently make similar comments to employees outside of plaintiff's protected class. **Issues EEOC is Addressing as Amicus:** (1) Did the district court err in holding that plaintiff could not establish a hostile work environment after he presented evidence that his supervisor ridiculed his name, accent, and grammar? **EEOC's Position:** The EEOC argued that a reasonable jury could find that the harassing comments were sufficient to create a hostile work environment claim. Specifically, the agency argued that the standard for hostile work environment claims is lower when the alleged harasser is a supervisor. The EEOC also contended that the district court erred when it did not specifically analyze each specific incident to determine whether it was sufficiently severe, nor did it provide analysis on whether the incidents as a whole were pervasive. **Court's Decision:** The Second Circuit affirmed the judgment of the district court. "While [employee] does point to evidence that he was subjected to frequent harassment in the form of jokes about his accent and national origin, the harassment, while inappropriate and offensive, does not rise to the level of creating a hostile work environment in the circumstances here."				

740 The information included in Appendix C, including the *"FY 2020 Appellate Cases Where the EEOC Filed an Amicus Brief"* and *"FY 2020– Appellate Cases Where the EEOC Filed as the Appellant"* were pulled from the EEOC's publicly available database of appellate activity available at http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix C includes select cases from this database. The cases are arranged in order by circuit.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lenzi v. Systemax, Inc.	U.S. Court of Appeals for the Second Circuit No. 18-979	8/16/2018 (amicus filed) 12/6/2019 (decided)	EPA Title VII	Retaliation Sex **Result:** Pro-Employee

Background: Plaintiff worked as the director of risk management for defendant. Plaintiff brought suit for pay discrimination under the EPA and Title VII, pregnancy discrimination under Title VII, and retaliation under the EPA and Title VII. Plaintiff alleged her base salary and bonuses were significantly lower than that of her male colleagues, and that defendant took adverse employment actions against her when she complained about these facts to the CEO. Further, plaintiff alleged she was the subject of sexist comments and behavior by defendant when she informed defendant that she was pregnant.

The district court concluded plaintiff did not prove a *prima facie* case of pay discrimination under the EPA and Title VII because the male colleagues with whom she compared base salaries did not perform "substantially equal" work, and thus could not be compared to her salary. Further, the district court rejected plaintiff's sex discrimination claim because she failed to establish that the positions held by her counterparts were substantially equal to the position that she held. The court went on to say that even if plaintiff did establish that her counterparts' jobs were substantially equal to her position, she did not produce evidence of discriminatory animus sufficient to establish a *prima facie* case of discriminatory pay based on sex. Regarding plaintiff's pregnancy discrimination claim, the court similarly concluded that plaintiff could not establish a *prima facie* case because the circumstances did not give rise to an inference of discrimination. Finally, the district court granted summary judgment to defendant on plaintiff's EPA and Title VII retaliation claims, reasoning plaintiff did not plead sufficient facts to establish that she engaged in protected activity.

Issue EEOC is Addressing as Amicus: (1) Whether the district court misapplied the relevant standard in analyzing plaintiff's Title VII pay discrimination claim; (2) Whether the district court erred when it determined that plaintiff failed to establish a *prima facie* case of pregnancy discrimination under Title VII; and (3) Whether the district court erroneously concluded that plaintiff failed to establish a *prima facie* case of retaliation under Title VII.

EEOC's Position: The EEOC argued that a Title VII pay discrimination plaintiff need not establish an EPA *prima facie* case or demonstrate "equal pay for equal work." The EEOC contended that the standard for Title VII pay discrimination on the basis of sex is different from the EPA standard, and encompasses situations that would not be actionable under the EPA, including plaintiff's claim. Instead, the EEOC argued that to survive summary judgment plaintiff only needed to present direct evidence of pay discrimination or may proceed under the *McDonnell Douglass* burden-shifting framework or indirect evidence approach. The EEOC further asserted that the district court erred in deciding that plaintiff failed to establish a *prima facie* case of pregnancy discrimination. The EEOC argued that though there were no explicit negative comments or criticism based on plaintiff's pregnancy, the proximity in time between learning of her pregnancy and an adverse employment action should be sufficient to establish pregnancy discrimination. Finally, the EEOC contended plaintiff established a *prima facie* case of retaliation because a jury could conclude that plaintiff's multiple complaints about her perceived salary disparity led to the job termination.

Court's Decision: On December 6, 2019, the court vacated and remanded the district court's judgment dismissing the plaintiff's pregnancy discrimination, Title VII retaliation, and Title VII pay discrimination claims. The court held the plaintiff presented enough evidence of temporal proximity between the plaintiff's announcing her pregnancy and the adverse employment action to support a pregnancy discrimination claim under the Pregnancy Discrimination Act. With respect to the pay discrimination claim, the appellate court determined the lower court erred in requiring the plaintiff to present under Title VII and local law the same *prima facie* case she would need to make under the EPA. The court emphasized that "a Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay. By its plain terms, Title VII makes actionable any form of sex-based compensation discrimination. 42 U.S.C. § 2000e-2(a)(1) ('It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation . . . because of such individual's . . . sex . . . .')." The plaintiff was also able to set forth sufficient evidence to support her retaliation claim under Title VII.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Rasmy v. Marriott International	U.S. Court of Appeals for the Second Circuit No. 18-3260	3/12/2019 (amicus filed) 3/6/2020 (decided)	Title VII	Harassment **Result:** Pro-Employee
Background: Plaintiff asserted a claim that defendant subjected him to a hostile work environment based on his race, national origin, and religion. Plaintiff alleged that after he complained about alleged wage theft and unfair scheduling his coworkers began calling him numerous names including "F****** Egyptian", "f****** camel", etc. Plaintiff also alleged that human resources told him that his "days would be numbered" if he continued to complain at work. Plaintiff's employment was ultimately terminated after he was in a physical altercation at work. The district court dismissed the complaint, holding that many of the alleged comments were not based on plaintiff's religion or race and were instead based on personal animosity after plaintiff complained of alleged wage theft and scheduling. The district court also held that plaintiff did not establish a hostile work environment as it did not alter the conditions of his employment. **Issues EEOC is Addressing as Amicus:** (1) Did the district court err in holding that plaintiff did not demonstrate he was subject to direct harassment? (2) Did the district court err in holding that because plaintiff had not been physically threatened and his work performance did not suffer, that the alleged harassment did not alter the conditions of his employment? **EEOC's Position:** The EEOC argued that the district court erred when it only considered comments specifically about plaintiff's race or religion, instead of all abusive comments not directly related to his protected class. The EEOC also contended that plaintiff did not need to establish that he was physically threatened or that his work suffered in order to establish a hostile work environment claim. **Court's Decision:** The Second Circuit vacated the judgment of the district court and remanded the case for trial. The court held: "(1) a hostile work environment claim does not require a plaintiff to show that he or she had been physically threatened by the defendant or that his or her work performance has suffered as a result of the claimed hostile work environment; (2) discriminatory conduct not directly targeted at the plaintiff (*e.g.*, discriminatory remarks made in the plaintiff's presence though not directly aimed at such employee) can contribute to an actionable hostile work environment; and (3) dismissal of [employee's] retaliation claim by summary judgment was improper because [employee's] submission in opposition to the motion presented disputed issues of material fact that should be resolved by a jury."				
Coleman v. Miquon Inc.	U.S. Court of Appeals for the Third Circuit No. 20-1115	7/21/2020 (amicus filed) 1/27/2021 (order granting stipulation of dismissal)	Title VII	Race, Harassment **Result:** n/a
Background: Plaintiff, a Black man, asserted claims against defendant for hostile work environment based on his race and discriminatory and/or retaliatory termination. Plaintiff alleged that after being hired to work as a bartender in defendant's restaurant for the summer, coworkers "quite frequently" used racial slurs in his presence. While plaintiff's coworkers testified that defendant "discussed 'not talking meanly towards anyone, no racial profanity, etc.' every day," plaintiff alleged that racially offensive language was never discussed. Plaintiff further claimed that managers were present on the restaurant floor when racial comments were made, and that he verbally complained of the racial comments on four occasions. Plaintiff also stated that he submitted an anonymous complaint, and that on September 19, 2015, he sent a letter to his supervisor and an email to the employee in charge of payroll complaining about racial harassment. On September 21, 2015, plaintiff's employment was terminated as part of a layoff at the end of the summer season. A total of 55 employees were let go at the end of the summer season. The district court granted defendant's motion for summary judgment finding that plaintiff failed to establish a hostile work environment because his testimony failed to "identify language that was intentionally used against him because of race," or "show that the racist language was weaponized." The court also found that plaintiff had failed to proffer any evidence showing that the conduct interfered with his work performance. Finally, the court found that even if plaintiff had established a hostile work environment, defendant would not be liable because there was no evidence defendant knew or should have known about the alleged harassment and failed to take adequate remedial action. Notably, the court refused to consider plaintiff's verbal complaint because he could not recall when he made them. The court also refused to consider plaintiff's written complaints because they were never received by the intended recipients. The court did, however, consider plaintiff's anonymous complaint because defendant had acted on that complaint. Specifically, defendant held a meeting "to reinforce [its] policy that racially offensive language or conduct is not tolerated." **Issues EEOC is Addressing as Amicus:** (1) Could a reasonable jury find that plaintiff was subjected to a discriminatory hostile work environment where his coworkers directed the n-word to him "all the time," and he regularly heard his coworkers and his supervisors make additional racial slurs? (2) In light of plaintiff's repeated complaints and the pervasiveness of the offensive conduct, could a reasonable jury find that defendant knew or should have known about the ongoing harassment yet failed to appropriate corrective action? **EEOC's Position:** The EEOC argued that the district court erred when it ignored evidence that plaintiff's coworkers targeted him with the n-word "all the time" and mistakenly downplayed evidence of racist comments that were not directed at plaintiff but that he overheard. The EEOC also contended the district court erred in holding that defendant could not be liable for the harassment because a reasonable jury could find that defendant knew or should have known about the harassment based on the fact that plaintiff made multiple verbal complaints to different supervisors about racial harassment and none took action. **Court's Decision:** On January 27, 2021, the Third Circuit granted the appellant's stipulation to dismiss the case.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Kengerski v. Allegheny County	U.S. Court of Appeals for the Third Circuit No. 20-1307	5/13/2020 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff, a White correctional officer, complained about "harassment and inappropriate racial text messages" stemming from an interaction with a colleague who made racially offensive remarks regarding his family member, who is biracial, and about other minority groups. The plaintiff was fired seven months after the complaint. The county employer alleged the plaintiff was fired for encouraging subordinates to provide false information in an internal investigation and for revealing the existence of the investigation to its subject. The plaintiff alleges these reasons were pretext for retaliation. The plaintiff sued, and the court granted the employer's motion for summary judgment as to the retaliation claim, finding the complaint did not constitute protected opposition activity because he could not have had an objectively reasonable, good-faith belief that the conduct about which he complained was unlawful under Title VII. Specifically, the plaintiff did not have an objectively reasonable, good-faith belief that he was complaining about a hostile work environment under Title VII because the co-worker's harassment was directed at Black and Asian individuals, and plaintiff was not a member of either protected group. The district court reasoned that even if the Third Circuit were to recognize a claim for "associational" discrimination, the plaintiff's connection to his biracial grand-niece (and to the coworkers referenced in the text messages) was too "remote" to support such a claim. Second, even if he had standing, the conduct was not sufficiently severe or pervasive to establish a hostile work environment.

Issue EEOC is Addressing as Amicus: Whether the district court erred when it determined that Title VII's antiretaliation protections do not extend to a plaintiff-employee's opposition to a coworker's discriminatory statements about the employee's interracial association with a family member and the coworker's subsequent racist text messages.

EEOC's Position: To be protected under the opposition clause of Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a), it is sufficient for an employee to hold an objectively reasonable, good-faith belief that complained-of conduct violates Title VII. The district court misapplied this standard by making several legal errors in identifying whether plaintiff engaged in conduct protected by Title VII. First, harassment toward an employee because of the employee's association with a person of a different race may give rise to an objectively reasonable, good-faith belief that the conduct violates Title VII. The proper analysis of such a claim focuses on whether the employee was discriminated against on the basis of his or her race by virtue of maintaining an interracial association, not on the degree of closeness of that interracial relationship. Second, discriminatory workplace harassment need not be "severe or pervasive" for an employee who opposes it to receive protection from reprisal under Title VII. To hold otherwise would contravene the purpose of Title VII's antiretaliation provision by exposing to reprisal individuals who promptly report discriminatory behavior while protecting only those who stand silently by until harassment becomes "severe or pervasive."

Court's Decision: Pending.

Martinez v. UPMC Susquehanna	U.S. Court of Appeals for the Third Circuit No. 19-2866	4/16/2020 (amicus filed) 1/29/2021 (decided)	ADEA	Age **Result:** Pro-Employee

Background: Plaintiff alleged that his job termination violated the ADEA. Specifically, plaintiff alleged that defendant abruptly terminated his employment after acquiring his former employer and replaced him with "a significantly younger, less qualified, less experienced individual." The district court granted a motion to dismiss for defendant, ruling that the complaint failed to identify his replacement's age or inferior qualifications, and thus presented no facts other than legal conclusions in support of his claim.

Issues EEOC is Addressing as Amicus: Did the district court err in concluding that a complaint failed to state a plausible claim of age discrimination under the ADEA when it only referred to a "significantly younger" and "less qualified" replacement?

EEOC's Position: The EEOC argued that pleading standard under *Swierkiewicz, Twombly*, and *Iqbal* only requires alleging facts that make out a facially plausible claim for relief, providing the defendant fair notice of the claim and its factual basis. Specifically, the EEOC contended that the complaint provided defendant with fair notice of the claim as well as the grounds upon which it rested. The complaint identified plaintiff's age, his qualifications, described his termination, identified his replacement by name, and provided that his replacement was "significantly younger" and "less qualified." As a result, the EEOC contended, defendant had ample notice of the legal claims to provide a response.

Court's Decision: The Third Circuit reversed the lower court's decision, reasoning that "[t]he hospital knows the younger doctors' exact ages and specialties, and discovery will let [the employee] uncover those and other details in time for summary judgment and trial." Calling the replacement employee "significantly younger" "is a commonsense description of a subsidiary fact, not the ultimate issue the plaintiff must prove." Thus, the employee plausibly pleaded a case for age discrimination under the ADEA.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Simko v. U.S. Steel Corp.	U.S. Court of Appeals for the Third Circuit No. 20-1091	4/30/2020 (amicus filed)	ADA	Charge Processing **Result:** Pending

Background: Plaintiff filed a claim against defendant alleging retaliation for terminating his employment after filing an EEOC charge alleging disability discrimination for failing to provide him a reasonable accommodation and by paying him at the wrong rate while training for a new position. After filing his charge, plaintiff's job was terminated for "unsatisfactory work." Plaintiff grieved the dismissal and was reinstated under a "last chance agreement," but was subsequently suspended and then terminated for a safety violation. Shortly thereafter, plaintiff wrote a letter to the EEOC stating that he was terminated twice and placed on a last-change agreement and that "anyone who familiarizes themselves with the detail of the case will clearly see it as retaliation for filing charges with the EEOC." After conducting an investigation more than one year after plaintiff filed his charge, the EEOC worked with plaintiff to amend his charge to include allegations for retaliatory discharge. Plaintiff submitted his amended charge almost four years after filing his initial charge with the EEOC. The EEOC found reasonable cause to believe defendant retaliated against plaintiff, and after efforts to conciliate were unsuccessful, plaintiff filed this lawsuit claiming that defendant has retaliated against him. The district court dismissed plaintiff's complaint, holding that his retaliation claim was not fairly within the scope of his original complaint because the charge's core grievance was discrimination, not retaliation. The court also held that none of the qualifying circumstances for equitable tolling applied because plaintiff was not actively misled by defendant, he was not prevented from asserting his rights, and he had not timely asserted his rights in the wrong forum.

Issues EEOC is Addressing as Amicus: (1) Did plaintiff's November 2014 letter to the EEOC constitute a valid administrative charge because the letter can reasonably be construed as a request for the EEOC to take action, and plaintiff's subsequent verification related back to the original filing date? (2) Even if plaintiff's November 2014 letter did not constitute a valid charge, should the district court have tolled the charge-filing period because the EEOC violated its own regulations by failing to help him file a charge? (3) Can plaintiff allege retaliation for the filing of a previous charge without having filed a new charge, because the EEOC actually investigated his allegations? (4) If this court believes that its prior precedent precludes consideration of whether the EEOC actually investigated plaintiff's allegations, should the court hear the case initially *en banc*?

EEOC's Position: The EEOC argued that plaintiff's November 2014 letter to the EEOC satisfied all the required elements of an administrative charge because it alleged that defendant had retaliated against plaintiff for filing a charge in 2013, which was an implicit request for the EEOC to consider retaliation as part of its ongoing investigation. The EEOC also argued that even if plaintiff's letter did not qualify as a charge, the district court erred by refusing to toll the charge-filing deadline because the EEOC violated its mandatory obligation to assist plaintiff in filing a retaliation charge. The EEOC further contended that whether plaintiff filed a new charge or not is irrelevant because circuit precedent provides that an individual need not file a new charge if the EEOC actually investigates the new allegations, which is what occurred here. Finally, the EEOC supported plaintiff's request for a hearing *en banc* because the retaliation claim is reasonably related to the original charge.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Elledge v. Lowe's Home Centers LLC	U.S. Court of Appeals for the Fourth Circuit No. 19-1069	4/19/2019 (amicus filed) 11/18/2020 (decided)	ADA ADEA	Disability Age Retaliation **Result:** Pro-Employer

Background: Plaintiff worked for defendant for 22 years, climbing the ranks and culminating with his role as the market director overseeing 12 stores. In that role, plaintiff worked 50-60 hours per week, most of which was spent on his feet. After plaintiff underwent a knee replacement surgery, his physician restricted plaintiff to an eight-hour workday and four hours of walking or standing. After plaintiff's physician recommended that plaintiff's work restrictions be permanent, defendant determined it could not accommodate plaintiff's permanent restrictions as the market director. At that point, defendant advised plaintiff that he needed to find a new job at the company within 30 days but if he needed additional time to search for a job, defendant could place him on a leave of absence. Plaintiff utilized leave for several months while he searched for other positions, but he ultimately requested early retirement. Thereafter, plaintiff filed suit against defendant alleging disability discrimination, age discrimination, and retaliation for filing an EEOC charge of discrimination.

The district court granted summary judgment in favor of defendant on all claims. Regarding his disability discrimination claim, the district court rejected plaintiff's contention that he was entitled to special treatment of defendant's job application and hiring policy, and instead, he was required to adhere to the policy and "compete on equal footing with other employees and outside applicants." Additionally, the court reasoned that plaintiff's requested accommodation of reassignment to another director-level position was not reasonable under the ADA because as long as the employer has a competitive hiring policy, it need not reassign disabled employees to vacant, equivalent positions. The court went on to say that plaintiff was not a qualified individual under the ADA because he rejected a reasonable accommodation offered to him (use of a motorized scooter). Further, the court rejected plaintiff's age discrimination claim, reasoning that plaintiff was not qualified for any of the director positions for which he applied. As to plaintiff's retaliation claim, the court found that such claim was "stale" because he was rejected for a position five months after he filed his charge of discrimination with the EEOC.

Issues EEOC is Addressing as Amicus: (1) Whether an employer's competitive hiring policy complies with its obligation under the ADA regarding the reassignment duty when the employer allows an employee to apply for a vacant position in accordance with the competitive hiring policy; (2) Whether the district court erroneously determined the employer's competitive hiring policy effectively trumps the ADA duty to reassign.

EEOC's Position: The EEOC argued that the ADA requires employees to reassign, not just permission to compete for a position, meaning that an employer is required to appoint employees to vacant positions for which they are qualified when they are no longer able to perform the essential functions of their current positions due to a disability. In support, the EEOC pointed to the statutory interpretation of the ADA itself, arguing that the statutory term "reassignment to a vacant position" does not mean "permission to compete for jobs with other employees." Additionally, the EEOC argued that an employer may be required to make exceptions to its competitive hiring policies in order to reasonably accommodate a disabled employee as necessary to achieve the ADA's goal of equal opportunity.

Court's Decision: The Fourth Circuit upheld the district court's decision. With respect to the reassignment issue, the court cited the Supreme Court's decision in *U.S. Airways v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002), explaining that "*Barnett* does not require employers to construct preferential accommodations that maximize workplace opportunities for their disabled employees. It does require, however, that preferential treatment be extended as necessary to provide them with the same opportunities as their non-disabled colleagues." Moreover, *Barnett* requires courts to weigh the stability in employee expectations, which the Court "invoked as the 'most important' reason justifying the precedence of the employer's seniority-based system over the disabled employee's otherwise valid right to reassignment." *Elledge v. Lowe's Home Centers*, LLC, 2020 U.S. App. LEXIS 36236, *24 (4th Cir. Nov. 18, 2020), *citing Barnett*, 535 U.S. at 404-05. In this instance, the Fourth Circuit determined that the employer's system was "on its face, disability neutral. It invites, rewards, and protects the formation of settled expectations regarding hiring decisions. And most importantly, it is a reasonable, orderly, and fundamentally fair way of directing employee advancement within the company. In the ordinary 'run of cases,' reassignment in contravention of such a policy would not be reasonable." 2020 U.S. App. LEXIS 36236, **25-26.

Lyons v City of Alexandria	U.S. Court of Appeals for the Fourth Circuit No. 20-1656	9/22/2020 (amicus filed)	Title VII	Race **Result:** Pending

Background: A firefighter, who is Black, was required to participate in the Advanced Life Support Internship Program. He alleged the city employer discriminated against him on the basis of race by assigning three White employees to participate in the program before allowing him to participate. The district court granted the defendant's motion for summary judgment, finding that when a plaintiff's claim involves "actions short of firing, demotion, or other clearly 'ultimate' employment decisions—such as reassignments—the Fourth Circuit has held that the plaintiff must show 'some significant detrimental effect on [him].'" The district court held the plaintiff's claim failed because he had not shown a significant detrimental effect on him or his continued employment with the city.

Issues EEOC is Addressing as Amicus: Whether delaying placement in an internship program that is a prerequisite for a promotion, on the basis of race, constitutes discrimination "with respect to * * * [the] terms, conditions, or privileges of employment" under Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), without a showing that such discrimination had a significant detrimental effect on the employee.

EEOC's Position: Delaying placement, on the basis of race, in an internship program that is a prerequisite for a promotion is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no showing of a "significant detrimental effect" is required.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Parks v. Louisiana-Pacific Corp.	U.S. Court of Appeals for the Fourth Circuit No. 19-2015	12/27/2019 (amicus filed) 2/20/2020 (dismissed)	Title VII	Race Harassment **Result:** n/a

Background: Plaintiff alleged that defendant subjected him to discrimination and a hostile work environment based on his race. Specifically, plaintiff argued he was subject to multiple racial slurs, had a sign placed on his locker stating "We don't want n****** in maintenance" and saw the words "n*****" and KKK carved into a bathroom stall. Additionally, in two separate incidents, plaintiff had a dead skunk and deer genitalia placed in his locker. The district court granted summary judgment to defendant. The district court reasoned that plaintiff had not shown the dead animals placed in his locker were related to his race. Further, the other harassing incidents were not severe or pervasive noting that there was no allegations of management's involvement, Plaintiff could not identify any of the alleged culprits, and could only identify three times when he was subject to the word n*****" during a 10-year period. Further, the district court reasoned that the harassment consistently stopped after plaintiff complained to management.

Issues EEOC is Addressing as Amicus: 1) Under applicable Supreme Court precedent, should a court consider all acts before and during the limitations period that contribute to a single alleged racially hostile work environment? 2) Did the district court erroneously assess plaintiff's hostile work environment claim when it disaggregated incidents of racial harassment, refused to consider facially neutral "pranks" and comments accompanying overtly discriminatory acts, deemed evidence relating to other incidents insufficiently specific, and concluded as a matter of law that the harassment was not severe or pervasive? 3) Did the district court err in concluding that plaintiff's employer was not liable for the alleged harassment as a matter of law?

EEOC's Position: The EEOC argued that the district court erred in dividing plaintiff's hostile work environment claim into separate incidents, as opposed to looking at the totality of the circumstances. Specifically, the EEOC argued that "evidence of specific racial slurs targeting [plaintiff], the racist note and cartoon taped to his locker, the widespread racist graffiti, and the multiple 'pranks' victimizing him" permitted a reasonable jury to find severe and pervasive conduct creating a hostile work environment. The EEOC also argued that plaintiff did not need to identify specific dates and culprits for each incident of harassment to survive summary judgment. Moreover, the EEOC contended that even if plaintiff did not complain about each incident of harassment, defendant had at least constructive knowledge of the harassment given the clearly visible racist graphite at the worksite.

Court's Decision: On February 20, 2020, the case was voluntarily dismissed.

Perdue v. Sanofi-Aventis U.S.	U.S. Court of Appeals for the Fourth Circuit No. 19-2094	1/9/2020 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff worked for defendant for 16 years as a sales professional and sued for failure to accommodate and discriminatory termination based on plaintiff's disability. During her employment, plaintiff was diagnosed with several autoimmune diseases. Plaintiff was able to manage her condition after rehabilitation and with medication, and was able to continue working successfully through defendant's "FlexWorks" policy. Following a restructuring of defendant's sales organization, plaintiff was assigned a larger territory. Plaintiff claimed her health deteriorated with all the additional driving she had to do to cover her new territory. Plaintiff claimed she discussed this issue with her territory supervisor and the potential accommodation of returning to a FlexWorks arrangement. Plaintiff's territory supervisor identified a potential opening for a FlexWorks arrangement that would allow plaintiff to enter into a work-share with another employee, but this accommodation was not feasible given the needs of the territory plaintiff wanted to work in. As an alternative, defendant offered plaintiff hotel stays and a more comfortable car to assist her with the long drives in her new territory. Plaintiff rejected these proposed accommodations and claimed that her doctor did not believe they would help her perform the job. On September 19, 2017, plaintiff's job was terminated while she was on leave because she could not return to her full-time position and could not provide a date when she would be able to return to work with or without accommodations. Plaintiff then sued defendant for failure to accommodate and discriminatory termination. The district court granted defendant's motion for summary judgment, finding that the ADA does not require defendant to make an exemption to its policy that work-share arrangements must meet its business needs to accommodate plaintiff. The district court also found that plaintiff failed to proffer sufficient evidence to overcome defendant's showing that it denied her accommodation request for legitimate nondiscriminatory reasons.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in granting summary judgment on plaintiff's failure-to-accommodate claim where defendant rejected her proposed reasonable accommodation and then merely advised her to search for open positions on her own and apply for long-term disability benefits. (2) Whether the district court erred in granting summary judgment on plaintiff's wrongful-termination claim where a reasonable jury could find that defendant's explanation for denying the reasonable accommodation she requested was a pretext for disability discrimination.

EEOC's Position: The EEOC argued the district court made four principle errors. First, the EEOC argued that although plaintiff was the non-moving party, the court viewed critical, disputed facts in the light most favorable to defendant and substituted its own judgment and inferences for those of the factfinder. Second, the EEOC argued that the court misread the Supreme Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) as requiring a proposed accommodation to yield to any disability-neutral policy. Third, the EEOC argued that the district court improperly applied the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting analysis to plaintiff's failure-to-accommodate claims, which do not require a plaintiff to establish the employer's motive. Lastly, the EEOC argued that the district court placed the burden of identifying a reasonable accommodation solely on plaintiff when the ADA's interactive process requires bilateral cooperation, and that a reasonable jury could find that defendant failed to participate in that process in good faith.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Roberts v. Glenn Industrial Group, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 19-1215	5/9/2019 (amicus filed)	Title VII	Harassment Sex **Result:** Pending
Background: Plaintiff worked for defendant from July 2015 to April 2016 and sued for same-sex harassment and retaliation in violation of Title VII. He claimed that during his tenure his supervisor repeatedly ridiculed and demeaned him by calling him gay, using sexually explicit and derogatory language towards him and physically threatening him. He also claimed he was slapped, put in a headlock and pushed. Plaintiff claimed he was fired in retaliation for complaining about the alleged harassment to other supervisors. The district court rejected plaintiff's claims and granted defendant summary judgment. It stated that in *Oncale v. Sundowner Offshore Services, Inc.* "the Supreme Court identified three situations that may support a same-sex claim of harassment based on gender: (1) the plaintiff presents credible evidence that the alleged harasser is homosexual and made 'explicit or implicit proposals of sexual activity'; (2) the plaintiff shows that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace; or (3) the plaintiff offers 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" *Oncale*, 523 U.S. at 80-81. The district court concluded that none of the three *Oncale* factors had been met because the alleged harasser was a straight man and while his conduct was inappropriate and vulgar, it was not of a sexual nature. Moreover, there was no evidence he was hostile towards men in the workplace and defendant's workplace was all men, removing the possibility of comparative evidence. **Issues EEOC is Addressing as Amicus:** (1) Whether besides the *Oncale* factors there are other ways of establishing same-sex harassment; (2) Whether physical abuse that is not sexual but perpetrated by an individual who has engaged in other explicitly sex-based abuse can be sex-based; and (3) Whether an employer is entitled to the *Faragher-Ellerth* affirmative defense when plaintiff reported the alleged harassment to multiple company officials but not to the CEO. **EEOC's Position:** The EEOC argues that a plaintiff may establish same-sex harassment using other evidence besides the three *Oncale* factors. The EEOC also contends that that district court was wrong in concluding that "facially neutral" physical conduct cannot be sex-based. Finally, the EEOC argues that the defendant is not entitled to the *Faragher-Ellerth* defense because it did not exercise reasonable care to prevent and correct sexual harassment since it failed to investigate and address plaintiff's repeated complaints. **Court's Decision:** Pending.				
Johnson v. Pride Industries, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 19-50173	6/17/2019 (amicus filed)	Title VII	Harassment Race **Result:** Pending
Background: Plaintiff, a Black man, sued for race discrimination and retaliation alleging that he was subjected to a hostile work environment. Plaintiff claimed that a co-worker frequently called him the Spanish language equivalent of the n-word, frequently addressing him as "boy," "pinch mayate" and "mano." The co-worker also victimized and harassed plaintiff in other ways such as hiding his work tool and the paperwork for his promotion. Plaintiff claimed that the alleged harassment escalated after he complained to various company officials. The district court rejected plaintiff's claims and granted defendant summary judgment holding that the use of racial slurs alone is not sufficient to establish a *prima facie* claim for hostile work environment based on race. The district court also concluded that since plaintiff failed to show he experienced sufficiently pervasive or severe harassment, he was not subjected to a constructive discharge. **Issues EEOC is Addressing as Amicus:** (1) Whether plaintiff's complaint stated a plausible claim for a hostile work environment where he alleges that another employee frequently called him the Spanish language equivalent of the n-word, and victimized him in other ways not obviously discriminatory; and (2) Whether the court erred in concluding that it had ancillary jurisdiction over plaintiff's constructive discharge, even though he failed to file a new EEEOC charge, because the claim grew out of an administrative charge properly before the court. **EEOC's Position:** The EEOC argues that the district court erred when it determined that the sole use of slurs is insufficient to establish hostile work environment. It contends that the frequent use of racial slurs is adequately severe and pervasive to establish a claim for workplace harassment. The EEOC also claims that when the alleged harasser also engages in various forms of abuse, some of which is explicitly discriminatory and some is not, all of it constitutes a single discriminatory conduct. The EEOC argues that the district failed to consider the totality of circumstances. Finally, the EEOC contends that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a constructive discharge claim growing out of an earlier charge. **Court's Decision:** Pending				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lockhart v. Republic Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 20-50474	9/23/2020 (amicus filed)	ADEA	Discrimination Race **Result:** Pending
Background: The plaintiff worked as a waste disposal driver for the defendant, and alleged that the employer discriminated against him with respect to his compensation, terms, conditions and privileges of employment on account of his race. He alleged his employment was terminated because he complained about the pay system; the employer presented evidence of disciplinary infractions. The district court held that the plaintiff did not show an adverse employment action connected to race OR any comparators who were treated more favorably. In addition, the court held that the employer articulated a legitimate, nondiscriminatory reason for the plaintiff's discipline and termination pursuant to the company's progressive discipline policy. **Issues EEOC is Addressing as Amicus:** The EEOC is asking whether the district court erred—because the plaintiff sued under Title VII and not the ADEA—it required him to offer comparator evidence as part of his *prima facie* case of discrimination. The EEOC also asks whether the lower court erred by failing to consider as circumstantial evidence of race discrimination that the decision-maker and an employee who influenced the termination decision allegedly used racial slurs to refer to the plaintiff and other Black employees. **EEOC's Position:** Title VII does not require evidence of comparators to establish a *prima facie* case of race discrimination. Even assuming, *arguendo*, that the ADEA and Title VII do have different causation standards, it would not explain why the *prima facie* case standard in a Title VII case would be narrower and more difficult to meet than under the ADEA. Moreover, the decision-makers' use of racial slurs to refer to plaintiff and other Black employees is strong circumstantial evidence that race discrimination was at least partially responsible for the termination. **Court's Decision:** Pending.				
Stancu v. Hyatt Corporation/ Hyatt Regency	U.S. Court of Appeals for the Fifth Circuit No. 18-11279	3/1/2019 (amicus filed) 10/21/19 (decided)	ADEA	Discrimination Harassment Retaliation **Result:** Pro-Employer
Background: Shortly after plaintiff begin his employment with defendant as an entry-level engineer, co-workers made plaintiff aware that defendant was discriminating against them and asked for advice. In response, plaintiff provided his co-workers EEOC literature on how to file a charge of discrimination. Plaintiff alleges that he was subjected to a hostile work environment based on his age and subjected to retaliation. Specially, plaintiff claims defendant placed offensive and threatening notes on his tool cart, stole his tools, spied on him, and refused to consider him for a promotion. After defendant moved for summary judgment on all claims, the magistrate judge recommended the motion be granted and the action dismissed. The district court accepted the magistrate judge's recommendation. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court should have rejected the magistrate judge's conclusion that plaintiff is required to prove an "ultimate employment decision" for his retaliation claim rather than simply an action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination; (2) Whether the district court wrongly usurped the jury's fact-finding role by agreeing with the magistrate judge that the anonymous age-based notes on plaintiff's tool cart were not objectively offensive as a matter of law, and by failing to consider other evidence of an age-based hostile work environment; (3) Whether the district court should have rejected the magistrate judge's conclusion that defendant could not be liable for a hostile work environment based on anonymous notes that may have been left by coworkers. **EEOC's Position:** The EEOC argued that the "ultimate employment decision" standard applies only to discrimination claims, not retaliation claims. Further, the EEOC argued that the magistrate determined the notes plaintiff found on his tool cart were not objectively offensive without describing the notes' content and failed to consider the totality of the circumstances in assessing plaintiff's hostile work environment claim. Finally, the EEOC argued that an employer may be liable for hostile work environment under the ADEA regardless of whether the alleged harassment was a member of management and regardless of whether the harasser was anonymous. **Court's Decision:** The Fifth Circuit affirmed the district court's grant of summary judgment in favor of defendant on all claims. As to the standard for retaliation claims under the ADEA, the court found that the "ultimate employment decision" is an "outdated and mistaken understanding of the law," however, even under the proper standard, no material issue of fact exists on that claim. Regarding the notes left on plaintiff's tool cart, the court held that because plaintiff did not specify how many notes he reported, the contents of the notes, or frequency of receiving notes after he complained, it would be "sheer speculation" to find the employer liable.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Williams v. TH Healthcare Limited	U.S. Court of Appeals for the Fifth Circuit 19-20134	6/19/2019 (amicus filed) 11/14/2019 (decided)	Title VII ADA	Charge Processing **Result:** Pro-Employee

Background: Plaintiff began working for the defendant hospital as a registered nurse in December 2008. In July 2016, plaintiff made a written request to the hospital for accommodation of her disability, because, she stated, "the accommodation that worked all these years would no longer be granted." Plaintiff subsequently met with the hospital's HR Director and another management official, who informed plaintiff that her accommodation request had been denied. Shortly thereafter, plaintiff was "written up for several reasons" and suspended before the hospital terminated her employment on October 17, 2016.

On January 17, 2017, plaintiff filed a charge of discrimination with the EEOC. Plaintiff alleged that the hospital's conduct toward her was the result of race discrimination and retaliation because she was in "a dispute with [her] former employer regarding pay discrepancies between Black and White nurses." Plaintiff further contended that the hospital also "discriminated and retaliated" against her because of her disability. Plaintiff, proceeding pro se, filed suit in district court on Monday, October 29, 2018, using a court-provided "complaint for employment discrimination" form. Plaintiff checked the box on the form indicating that the EEOC had issued her a notice of right to sue, and she wrote July 29, 2018, as the date she had received the notice. The hospital responded with a motion to dismiss the suit as untimely filed or, in the alternative, to compel arbitration.

On January 28, 2019—after the hospital filed its motion to dismiss but before plaintiff filed a response to that motion—the district court held an "initial conference" with the parties. On that same day, the court issued a four-sentence order dismissing the suit. According to the court, because plaintiff filed her suit 92 days after she received her notice of right to sue, it lacked jurisdiction over her claims and it dismissed plaintiff's claims with prejudice.

Issues EEOC is Addressing as Amicus: The two issues the EEOC addresses are: (1) Whether the district court erred in concluding that plaintiff's complaint was not timely filed; and (2) Whether the district court erred in holding that timely filing of a complaint is a jurisdictional prerequisite under the ADA and Title VII.

EEOC's Position: The EEOC argued that under the Federal Rules of Civil Procedure, plaintiff's time period for filing her complaint ran through October 29, 2018—the date on which she filed it. And, that in any case, under the district court's settled precedent, a plaintiff's filing of her Title VII or ADA complaint beyond the 90-day statutory filing period does not deprive a court of jurisdiction over her claims. Elaborating on its position, the EEOC argued that Rule 6(a) provides that the statutory filing period excludes the day triggering it (*i.e.*, the day plaintiff received her notice of right to sue), but includes every intermediate calendar day. Fed. R. Civ. P. 6(a)(1)(A), (B). The EEOC also noted that if the last day of that filing period, so calculated, falls on a Saturday, Sunday, or legal holiday, the filing deadline is extended until the next non-holiday weekday. Fed. R. Civ. P. 6(a)(1)(C); see also Fed. R. Civ. P. 6(a)(4)-(6) (defining, for purposes of Rule 6(a), the terms "last day," "next day," and "legal holiday"). The EEOC went on to note that both the hospital and the court overlooked Rule 6(a)(1)(C), because 90 days after plaintiff received her notice of right to sue fell on Saturday, October 27, 2018, which meant her actual deadline to file her complaint was Monday, October 29, 2018. Because, as the EEOC argues, it was uncontested that plaintiff filed her complaint on October 29, 2018, the district court erred in holding that her complaint was untimely. In support of its position on the second issue, the EEOC argued that the district court's ruling constitutes legal error because it contravenes the Fifth Circuit's long-settled precedent that the "ninety-day filing requirement is not a jurisdictional prerequisite, but more akin to a statute of limitations" and, accordingly, is "subject to equitable tolling."

Court's Decision: The Fifth Circuit reversed and remanded, holding that the plaintiff's lawsuit was timely and that the district court erred in dismissing it.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Wright v. Union Pacific Railroad Co.	U.S. Court of Appeals for the Fifth Circuit No. 20-20334	9/25/2020 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: The plaintiff alleged that her former employer retaliated against her in violation of Title VII by suspending and terminating her because of her 2016 lawsuit against the company and her July 2018 internal complaint to the EEO line about the alleged hostile work environment. The plaintiff was suspending pending the internal investigation. The district court granted the defendant's motion to dismiss the retaliation claim, explaining that the plaintiff claims that the defendant violated Title VII by retaliating against her for her earlier lawsuit against the company and for filing an internal complaint against her supervisor. The court determined her claim showed no connection between her termination and her 2016 lawsuit, which was settled in February 2018, and that there was no evidence to support the allegation her supervisor retaliated against her after she complained. The court noted the supervisor removed the plaintiff from service because she refused to complete required coaching.

Issues EEOC is Addressing as Amicus: Whether the district court erred in granting the defendant's motion to dismiss the plaintiff's Title VII retaliation claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that the operative complaint purportedly failed adequately to allege causation.

EEOC's Position: The plaintiff's complaint alleged that her employer suspended and terminated her employment after she filed a Title VII suit against the company and shortly after she lodged an internal sex-discrimination complaint, activity that is protected by Title VII's antiretaliation provision. The district court granted the defendant's motion to dismiss the Title VII retaliation claim under Federal Rule of Civil Procedure 12(b)(6), holding that her complaint did not adequately allege any causal connection between her protected activity and her suspension and termination. In reaching that conclusion, the district court accepted the employer's explanation for taking these actions and faulted the complaint for providing "[n]o evidence" of retaliation. This was in error, as the purpose of the pleading requirement is to ensure that a plaintiff alleges sufficient facts, "taken as true," to put the defendant on notice of the plaintiff's claim, *Twombly,* 550 U.S. at 555-56, and complaints that provide such notice should "unlock the doors" to discovery. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Requiring more at the complaint stage prevents the plaintiff from proceeding to the stage of litigation designed to allow her to acquire the evidence needed to prove her claim. In this appeal, only the "ultimate element" of causation is at issue, and the complaint asserted sufficient facts to support a causal link between the plaintiff's protected activity and her suspension and job termination.

Court's Decision: Pending.

Jackson v. Genesee County Road Commission	U.S. Court of Appeals for the Sixth Circuit No. 20-1334	8/10/2020 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff worked as Human Resources Director and Equal Employment Opportunity Officer for defendant. In her position she investigated discrimination complaints and revised the defendant's EEO policy. She concluded a race discrimination complaint against an employee had merit, and recommended he be placed on administrative leave and undergo a psychological evaluation. Following the evaluation, the plaintiff did not want the accused employee to return, while her supervisor d*Id.* She ultimately negotiated a severance agreement for the employee, and was fired two months later. The employer alleged it was because of her abrasive and offensive communication style; she alleged her termination was in retaliation for investigating the discrimination complaint and for her handling of contractors' EEO plan submissions. After filing suit, the district court held that the plaintiff's Title VII retaliation claim failed, in part, because she had not engaged in protected activity. The district court rejected her allegations under both the participation and opposition clauses of Title VII's anti-retaliation provision. On the opposition clause, the district court held that Jackson had not engaged in protected activity because she had not shown that her actions "were beyond her regular job duties."

Issues EEOC is Addressing as Amicus: Whether the district court erred in requiring the plaintiff to show that her actions as the Human Resources Director "were beyond her regular job duties" to constitute protected activity under the opposition clause of Title VII's antiretaliation provision, which prohibits discrimination against "any" employee "because he has opposed any practice made an unlawful employment practice by this subchapter," 42 U.S.C. 2000e-3(a).

EEOC's Position: The district court erred in concluding that the plaintiff did not engage in "opposition" within the meaning of Title VII's anti-retaliation provision. Even if she had established that she engaged in protected activity, the district court held that she failed to show a causal connection between that activity and her termination. And, even if the plaintiff had established that she engaged in protected activity that was causally related to her termination, the court held that she failed to rebut the defendant's legitimate, non-discriminatory reason for her termination. The opposition clause of Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). An employee can generally be said to have "opposed" an unlawful employment practice if she informs her employer that she believes unlawful discrimination occurred in the workplace. Because the district court found that her opposition did not go "beyond her job duties" as HR Director, however, it held that she had not engaged in protected activity. In so holding, the district court erred by following the "manager rule" that some courts have adopted under the Fair Labor Standards Act (FLSA). Whatever its validity under the FLSA, the manager rule cannot be grafted onto Title VII's plain text or squared with Sixth Circuit and Supreme Court precedent.

Court's Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Harrison v. Soave Enterprises LLC	U.S. Court of Appeals for the Sixth Circuit No. 19-1176	4/24/2019 (amicus filed) 9/10/2020 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff worked as a manager for defendants' auto parts business from December 2005 to August 2015. Her duties included patrolling the perimeter of the facility to guard against theft and spot-checking vehicles to ensure they were ready. The latter required plaintiff to kneel to look under the hood of the vehicle to ensure the catalytic converter had been removed. Around 2010 plaintiff suffered a knee injury that resulted in a torn anterior cruciate ligament (ACL). Because of the torn ACL, plaintiff could not kneel down or walk long distances and on certain terrains. Plaintiff requested that defendants purchase a mirror to aid her in inspecting the underside of the vehicles and defendants acquiesced. Her supervisor also informed her that another employee would assist with the perimeter patrols. Other than her inability to kneel and walk long distances, plaintiff had no other physical limitations that would preclude her from performing her duties. Plaintiff claims that on August 2015 her supervisor informed her that the company had terminated her employment because she could no longer perform her duties due to her torn ACL. Upon inquiring what part of her duties she had failed to perform, her supervisor informed her she had failed to patrol the facility perimeter. Plaintiff sued, alleging that defendants failed to provide her with a reasonable accommodation for her disability and terminated her employment because of her disability, in violation of the ADA. Plaintiff argued that she meets the ADA's definition of "disability" because she suffers an impairment that substantially limits a major life activity and defendants regarded her as disabled since they provided her with a mirror when she requested one. The district court rejected plaintiff's claim that her torn ACL alone constituted an impairment and granted defendants summary judgement. However, it concluded that defendants were plaintiff's employer since some companies can be so entangled that they constitute a single employer.

Issues EEOC is Addressing as Amicus: (1) Whether the district court applied the wrong standard for determining whether plaintiff had a disability under the amended ADA; (2) Whether the ADA requires medical evidence of a disability; and (3) Whether the district court applied the correct standard for determining plaintiff's employer.

EEOC's Position: The EEOC argues that the court applied the wrong standard for determining whether plaintiff had a disability. It argues that in 2008 Congress revised and expanded ADA coverage to include "a physical or mental impairment that substantially limits a major life activity." In doing so Congress provided that the term "substantially limits" is to be interpreted to require a lower degree of functional limitation. Thus, the district court wrongly relied on outdated, pre-ADAAA precedent in concluding that plaintiff's knee injury did not meet the threshold requirement of proving she was disabled because it certainly impedes her ability to walk and kneel. Moreover, defendants regarded plaintiff as disabled. The EEOC also argues that the amended ADA does not require medical proof of a disability. Finally, the EEOC contends that the district court applied the correct standard for determining plaintiff's employer because multiple entities can be so integrated that they constitute a single employer.

Court's Decision: The Sixth Circuit reversed and remanded, concluding that a dispute of fact exists over whether the defendant can be liable to the plaintiff under the ADA, precluding summary judgment. The court also disagreed with the lower court's conclusion that the plaintiff "failed to adduce sufficient evidence of an 'actual' or 'regarded-as' disability" under the ADAAA.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Jones v. Federal Express Corp.	U.S. Court of Appeals for the Sixth Circuit No. 19-5073	6/4/2019 (amicus filed)	Title VII	Charge Processing **Result:** Pending

Background: Plaintiff, who is Black, worked as a security officer at a shipping center operated by defendant. One of his duties was to watch an X-ray monitor to detect weapons in packages about to be loaded on defendant's aircraft. On August 4, 2017, plaintiff failed to detect a weapon. Twelve days later, defendant terminated his employment because he failed to detect that weapon. According to plaintiff, the consequences for failing to detect a weapon were harsher for him and another Black officer than they were for certain White officers.

Plaintiff filed a charge alleging discrimination with the EEOC on April 25, 2018, 252 days after his termination. After processing his charge, the Commission issued him a notice of his right to bring suit against defendant. In explaining the basis for closing its file on the charge, the EEOC completed a standard form, and it did not place a checkmark next to the statement "Your charge was not timely filed with EEOC."

Plaintiff subsequently filed a pro se Title VII action in district court alleging race discrimination. Defendant moved to dismiss, arguing that plaintiff had not filed a discrimination complaint with the Tennessee Human Rights Commission (THRC), and thus he had only 180 days to file his charge with the EEOC. Defendant argued that his EEOC charge, filed 252 days after his termination, was therefore untimely, and the case should be dismissed.

The district court accepted defendant's argument and dismissed the case with prejudice. Relevant here, the court acknowledged that plaintiff "argues that he should have 300 days in which to file his [EEOC] charge, because the Tennessee Human Rights Commission prohibits race discrimination in employment." The court held, however, that "[t]he existence of a state agency is not enough; instead, the person aggrieved must have actually 'instituted proceedings' which [sic] said agency." The court noted that plaintiff had not "allege[d] that he filed a charge with the Tennessee Human Rights Commission, so the 300-day deadline does not apply in this case." Plaintiff moved to alter or amend the judgment, and the district court denied that motion.

Issues EEOC is Addressing as Amicus: Whether a 300-day limitation applies to the plaintiff's EEOC charge, and whether the plaintiff's charge was filed with the Commission within that 300-day period.

EEOC's Position: In support of its position that a 300-day limitation applies to plaintiff's charge, the EEOC first noted that it has a "work-sharing agreement" with the THRC. The EEOC argued that because of this relationship, when plaintiff submitted his race-discrimination charge to the EEOC 252 days after he was terminated, three things automatically happened as a result of the work-sharing agreement: (1) the EEOC, acting as the THRC's agent, instituted a THRC proceeding; (2) the THRC terminated that proceeding (pursuant to its waiver); and (3) the EEOC instituted an EEOC proceeding. Accordingly, the EEOC argued, contrary to the district court's conclusion, plaintiff *did* institute proceedings with the THRC because the EEOC initiated such proceedings on his behalf, and, as a result, under 42 U.S.C. § 2000e-5(e)(1), p. A-3, the 300-day limitations period governed.

Court's Decision: Pending.

Thompson v. Fresh Products	U.S. Court of Appeals for the Sixth Circuit No. 20-3060	3/2/2020 (amicus filed) 1/15/2021 (decided)	ADA ADEA	Charge Processing Statute of Limitations **Result:** Mixed (Pro-Employer on underlying claims, Pro-Employee on statute of limitations issue)

Background: Plaintiff filed suit alleging her job termination was the result of age, race, and disability discrimination by defendant. The district court granted summary judgment to defendant, holding her ADA and ADEA claims were time-barred by operation of the handbook acknowledgment she signed upon her hiring, which required her to bring any claims or lawsuits against the employer within six months of the employment action at issue.

Issues EEOC is Addressing as Amicus: Whether contractual clauses that purport to shorten the limitations period of the ADA and ADEA are enforceable.

EEOC's Position: The EEOC argued that the ADA and ADEA's limitations period for filing suit are nonwaivable, substantive rights. Specifically, the EEOC argued that there is no meaningful distinction between Title VII and the ADA/ADEA as to the Supreme Court's decision in *Logan v. MGM Grand Detroit Casino*, recognizing that the limitations period in Title VII cannot be reduced by contractual argument. Each statute uses an integrated, multistep enforcement procedure established by Congress. As a result, according to the EEOC, the *Logan* Court's concerns about contractual interference with the statutorily defined limitations periods are equally present in the ADA and ADEA context.

Court's Decision: Although the appellate court affirmed the district court's grant of summary judgment to the employer on the discrimination and failure-to-accommodate claims, the appellate court sided with the employee on the statute of limitations issue. The court held "that the limitations periods in the ADA and ADEA give rise to substantive, non-waivable rights. Because [the plaintiff] brought a charge within five days of her termination and filed this lawsuit within ninety days of receiving her right-to-sue letter, her Title VII, ADA, and ADEA claims are timely."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Mahran v. Advocate Christ Medical Center	U.S. Court of Appeals for the Seventh Circuit No. 19-2911	2/6/2020 (amicus filed)	Title VII	Religion **Result:** Pending

Background: Plaintiff, an Egyptian Muslim, worked as a full-time pharmacist for defendant and filed a complaint alleging various forms of discrimination and retaliation based on religion, ethnicity, and national origin in violation of Title VII. As a practicing Muslim, plaintiff's faith requires him to pray five times within each 24-hour period. This meant that plaintiff often had to pray one to two times during the work day. Plaintiff's supervisors knew of his religious requirement and defendant offered a nondenominational chapel where prayer is permitted and also offered an additional room on Fridays for Muslim prayer. In late 2015, the pharmacy director email HR to request additional information regarding prayer breaks because the number of breaks were impacting the department. An HR consultant stated that breaks and mealtimes may be taken as employees pleased, but that no accommodation had to be made if leaving the department several times a day has a negative impact on patient care. This message was shared with all Muslim pharmacists. Notably, plaintiff was never "overtly disciplined" for praying during a break, but he was prevented from taking a prayer break on one occasion when the pharmacy was particularly busy. Several months after this incident, and after being counseled and disciplined, plaintiff's employment was terminated for various performance issues. Plaintiff filed a complaint with HR alleged that his performance ratings and warnings stemmed from religious, racial, and ethnic discrimination. After receiving a right-to-sue notice from the Illinois Department of Human Resources, plaintiff filed this action. The district court ultimately granted defendant's motion for summary judgment in two stages. First, as to all claims except for religious discrimination based on failure to accommodate. Defendant moved for summary judgment again arguing that plaintiff did not raise a failure-to-accommodate claim, and that even if he had, the claim would still fail because it had accommodated plaintiff and any other accommodation would have been undue hardship. The district court agreed and granted defendant's summary judgment motion.

Issues EEOC is Addressing as Amicus: Whether Title VII requires an employer to reasonably accommodate its employees' and applicants' religious observances and practices, absent undue hardship, without regard to whether they suffered another adverse employment action resulting from the denial of such accommodation.

EEOC's Position: The district court erred by requiring evidence of another adverse action in addition to the refusal to accommodate plaintiff's religion because Title VII requires an employer to reasonably accommodate its employees' and applicants' religious observances and practices, absent undue hardship, without regard to whether they suffered another adverse employment action resulting from the denial of such accommodation.

Court's Decision: Pending.

Mlsna v. Union Pacific Railroad Co.	U.S. Court of Appeals for the Seventh Circuit No. 19-2780	1/9/2020 (amicus filed) 9/14/2020 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff alleged defendant failed to provide a reasonable accommodation when it denied his request to wear a hearing device. Specifically, after failing a hearing test, plaintiff requested if he could use a custom-made hearing device. Defendant denied this request on the grounds that the custom-made device lacked a noise reduction rating to measure how well it muddles sound. The district court granted summary judgment for defendant, reasoning that its rejection of the hearing device was reasonable, and a reasonable jury could not conclude that defendant's concern over the lack of device certification was pretext for discrimination.

Issues EEOC is Addressing as Amicus: (1) Did the district court err in concluding that to satisfy its duty to engage in the "interactive process" following plaintiff's request for an accommodation, the employer needed only to agree to look at particular accommodations the employee proposed and did not have to work with plaintiff to seek out accommodations that would allow him to do his job? (2) When the district court was evaluating whether the company unlawfully failed to provide a reasonable accommodation, did it err in holding that it should consider only specific accommodations plaintiff proposed during the interactive process, even where, as here, both parties knew during that process what kind of accommodation he would need?

EEOC's Position: The EEOC argued that the district court erred in concluding that defendant satisfied its interactive-process obligations by agreeing to consider any potential accommodations that plaintiff proposed. Specifically, the EEOC contended that the defendant was on notice that plaintiff needed a hearing device to perform his job duties, and while it disagreed with plaintiff's proposed device, it nevertheless had an obligation to propose other devices and/or accommodations as part of the interactive process. The EEOC also argued the district court erred in refusing to consider alternative devices identified by plaintiff during the summary judgment process, as "whether a reasonable accommodation existed at the time of the interactive process here should be based on all record evidence, including evidence adduced during district court proceedings."

Court's Decision: The Seventh Circuit reversed and remanded, finding that issues of fact exist as to whether wearing hearing protection is an essential function of the plaintiff's work as a conductor, as well as whether the employer properly considered reasonable accommodations.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Shell v. Burlington Northern Santa Fe	U.S. Court of Appeals for the Seventh Circuit No. 19-1030	8/28/2019 (amicus filed) 10/29/19 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Plaintiff worked for a third-party railyard operations company and applied for a job with defendant in 2010 when the company announced plans to take over those services. Plaintiff applied to work as an intermodal equipment operator, a job category defendant classified as safety-sensitive because it involves using heavy equipment, and defendant offered plaintiff a job contingent on his undergoing a physical. Defendant denied plaintiff the job after an exam showed he had a body mass index of 47.5, citing a policy of not letting workers with BMIs over 40 perform safety-sensitive jobs because of concerns they may develop conditions (such as sleep apnea, heart disease, and diabetes), all of which could "manifest as a sudden incapacitation" according to court documents. There was no evidence that plaintiff suffered from any of these conditions. Defendant informed plaintiff his application would be reconsidered if he lost 10% of his body weight and kept it off for six months, and provided defendant with any test results it requested (even if his BMI still exceeded 40). Plaintiff sued for alleged violation of the ADA. Defendant argued that the regarded-as provision of the ADA does not protect an individual from discrimination unless the employer perceives him to have a current (or perhaps, a prior) impairment, and because there was no evidence that defendant ever regarded plaintiff as impaired *at the time* it refused his application, it could not have violated the ADA. Defendant argued that the ADA's definition of "disability" is not met where an employer regards an applicant as not presently having a disability but is at a high risk of developing one. The lower court denied defendant's motion for summary judgment, holding that although plaintiff may not have been disabled under most courts' interpretation of the ADA, defendant may have violated the law by treating him as if he was, and that the ADA does reach discrimination based on a future impairment.

Issues EEOC is Addressing as Amicus: Whether a job applicant rejected based on an employer's concerns that he will develop a physical impairment may invoke the protections of the ADA, and if so, whether an employer may lawfully reject such an applicant based on statements by a company physician that the applicant poses a safety threat.

EEOC's Position: The district court correctly held that plaintiff is protected by the ADA because defendant regarded him as having an impairment within the meaning of the statute. Defendant acted "because of . . . perceived . . . impairment[s]" when it refused to hire plaintiff based on its fear that he would develop these impairments (sleep apnea, heart disease, and diabetes) in violation of the ADA (as amended). Denying plaintiff employment because of the risk that plaintiff may develop one of these three impairments, defendant was treating plaintiff as if he actually had those impairments. Moreover, coverage under the regarded-as provision is not limited to individuals perceived to have a current impairment because the there is no temporal limitation in the statute.

Court's Decision: The ADA's "regarded as" prong does not cover a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future. The Seventh Circuit panel of judges held that the evidence showed that defendant did not believe that plaintiff had any of the feared impairments when it refused his application and that when defendant echoed this position in its statement of material facts, plaintiff's response did not identify any evidence controverting that fact. The panel explicitly said that the text plainly encompasses only current impairments, not future ones, by using the key word "having" of "regarded as having ...an impairment" because "having" means presently and continuously and "does not include something in the past that has ended or something yet to come."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Garrison v. Dolgencorp	U.S. Court of Appeals for the Eighth Circuit No. 18-1066	4/10/2018 (amicus filed) 10/3/2019 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff was a full-time lead sales associate at defendant's store in Concordia, Missouri, where she was one of four employees with keys to the store. Plaintiff struggles with anxiety, depression, and migraine headaches. When these conditions required her to miss work, she would call her supervisor and explain what was happening. In early May 2014, plaintiff's doctor recommended that she take a few weeks off work and said that he could provide a note if necessary. Plaintiff texted her supervisor that day to ask how she could request a leave of absence. The supervisor contacted the district manager and explained plaintiff's request and her doctor's recommendations, but the district manager responded that there was no leave of absence. After several text messages from plaintiff, the supervisor responded that there was no leave of absence. As such, plaintiff asked her supervisor whether she could take leave under the Family and Medical Leave Act (FMLA). The supervisor instructed plaintiff to read the employee handbook for more information.

Plaintiff later texted her supervisor that she might need to have brain scans, as well as a mammogram for a lump in her breast. The supervisor replied that plaintiff should come to the office the following day so they could talk. When they met in person the next day, plaintiff said that she was seeking leave because of her worsening migraines, anxiety, and depression. She told her supervisor that she could provide a doctor's note if necessary and asked whether she should do so, but her supervisor said she did not need a note. Based on her supervisor's representation, plaintiff did not request a note from her doctor or provide defendant with medical documentation to support her leave request, and the request was denied.

After her leave request was denied, plaintiff indicated that she was going to have to quit, and had an anxiety attack and went to the emergency room. Plaintiff sued defendant for violations of the ADA, FMLA, and state law. She alleged under the ADA that defendant had failed to accommodate her disabilities and had retaliated against her by demoting and constructively discharging her. Defendant moved for summary judgment.

The district court granted summary judgment for defendant, after determining that plaintiff could not establish a *prima facie* case because she could not show an adverse employment action. The court also rejected plaintiff's contention that she was constructively discharged. Furthermore the court held that plaintiff had not requested a reasonable accommodation because she did not provide the relevant details about her disability and the reason that the disability required a leave of absence. Even assuming plaintiff had made an appropriate request for an accommodation, the court concluded that it was not reasonable, because it would have required the other store employees to cut their vacations short and/or work more hours. Finally, the court concluded that because plaintiff could not demonstrate that she suffered an adverse employment action, her retaliation claim also failed.

Issues EEOC is Addressing as Amicus: (1) Whether an employer's failure to accommodate a known disability is actionable under the Americans with Disability Act without an additional adverse action, given that the statute defines discrimination to include a failure to accommodate; (2) Whether a reasonable jury could find that plaintiff adequately requested a reasonable accommodation where her supervisor knew that she sought paid vacation time following a hospitalization to deal with ongoing disability-related health issues; (3) Whether a reasonable jury could find that a short period of leave would have been a reasonable accommodation under the ADA where plaintiff's supervisor testified that if she had been entitled to leave under the FMLA, the supervisor would have found a way to make it work; and (4) Whether the district court erred by overlooking Supreme Court precedent defining an adverse action more expansively in the context of a retaliation claim than in the context of a substantive discrimination claim.

EEOC's Position: The EEOC argues that the district court misinterpreted the ADA's mandate that employers must provide a reasonable accommodation for a known disability, and that the failure to accommodate is an adverse action that is sufficient, standing alone, to support a disability discrimination claim. According to the EEOC, the ADA defines discrimination to include a variety of employer actions, including a failure to provide a reasonable accommodation. Furthermore, the EEOC contends that a failure of accommodate an employee's or applicant's disability inherently discriminates with respect to the terms, conditions, and privileges of employment, and cites Eighth Circuit case law to this effect. With respect to other Eighth Circuit precedent that appears to require proof of an additional adverse action to establish a failure-to-accommodate claim, the EEOC contends that those decisions are incompatible with the plain language of the ADA and cannot stand. The EEOC also argues summary judgment was inappropriate because the plaintiff raised a genuine issue of material fact as to whether she requested a reasonable accommodation under the ADA and whether her request was reasonable. In support of this position, the EEOC emphasizes an employer's background knowledge is relevant in assessing the sufficiency of a request for an accommodation. Finally, the EEOC argues that the district court applied the wrong legal standard to assess whether plaintiff was subjected to an adverse action for purposes of her retaliation claim. According to the EEOC, in the context of a retaliation claim and as set forth in *Burlington Northern & Santa Fe Railways v. White*, 548 U.S. 53 (2006), plaintiff must show that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination based on the challenged action.

Court's Decision: The Eighth Circuit determined it is up to a jury to decide whether the employer failed to provide leave as a reasonable accommodation for the employee's conditions.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Horton v. Midwest Geriatric Management, LLC	U.S. Court of Appeals for the Eighth Circuit No. 18-1104	3/7/2018 (amicus filed) 7/10/2020 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff is a gay man who has been legally married to his male spouse since 2014. In February 2016, while the plaintiff was working for a competitor of defendant, he was contacted by an executive search firm for a position as the Vice President of Sales and Marketing for defendant. Plaintiff was offered the job, contingent upon a background check. The outside vendor conducting the check had trouble verifying plaintiff's education with two colleges. Plaintiff provided defendant and the vendor with an explanation and informed them that there would be a delay in procuring the necessary records. Defendant did not express concern about the delay. Before the completion of the background check, plaintiff signed the written job offer and returned it to defendant. One of the individuals who ran defendant responded that the company was excited to have him and inquired about his anticipated start date. Plaintiff began completing his pre-hire documentation and disclosed that he was in a same-sex relationship. Defendant subsequently informed him that because he did not complete his background check and provide the necessary supporting documentation, the company was withdrawing his offer of employment. After he subsequently obtained the documentation, plaintiff reached back out to the company about the open position, but was informed that defendant was considering other candidates.

Plaintiff sued defendant under Title VII, alleging that the company unlawfully discriminated against him on the basis of his sexual orientation. Plaintiff's sex discrimination claim comprised three theories: (1) sexual orientation is necessarily discrimination based on sex; (2) discrimination on the basis of his association with a person of a particular sex (his male partner); and (3) nonconformity with sex stereotypes. Defendant moved to dismiss plaintiff's complaint for failure to state a claim. In granting defendant's motion, the district court cited Eighth Circuit precedent from a 1989 holding that Title VII does not cover discrimination based on sexual orientation, and concluded that both the sex discrimination claim was merely a refashioned sexual orientation discrimination claim.

Issues EEOC is Addressing as Amicus: (1) Whether sexual orientation discrimination is a form of sex discrimination prohibited by Title VII because it involved impermissible consideration of sex, gender-based associational discrimination and/or sex stereotyping; and (2) Whether *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69 (1989), which states that Title VII does not prohibit sexual orientation discrimination, has been abrogated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

EEOC's Position: The EEOC argues that sexual orientation discrimination is cognizable as sex discrimination under Title VII for several reasons. First, the EEOC contends that sexual orientation discrimination inherently involves consideration of an individual's sex. In support of this argument, the EEOC contends that an employer's failure to directly reference gender is not dipositive and emphasizes that the correct way to analyze the issue is to compare treatment of men attracted to men versus women attracted to men. Second, the EEOC asserts that when an employer's motivation for an adverse employment action is opposition to same-sex relationships, the employer is engaged in gender-based associational discrimination. According to the EEOC, the Title VII prohibition against adverse employment actions based on opposition to same-sex relationship stems inevitably from the statute's prohibition of discrimination based on opposition to interracial relationships. The EEOC argues that the rational underlying the *Loving v. Virginia*, 388 U.S. 1 (1967) decision is applicable and that discrimination based on same-sex association targets individuals based on sex, which violates Title VII. Additionally, the EEOC contends that when discrimination against a gay employee rests on that individual's failure to conform to the societal expectation of opposite-sex attraction, the employer violated Title VII's prohibition on gender stereotyping. The EEOC alleges that the plain language of Title VII incorporated sexual orientation because the statute prohibits discrimination based on sex stereotypes, and that the holding in *Oncale*, requires the court to interpret the statute as written, without judicial carve-outs, even when the language goes beyond the principal evil that Congress sought to address. Finally, the EEOC argues that *Williamson* is no longer good law, because the decision relied on outdated precedent and did not consider the decision in *Price Waterhouse*, and, as such, does not prohibit of finding that discrimination based on sexual orientation violates Title VII.

Court's Decision: On April 25, 2019, the Eighth Circuit agreed to hold consideration of this appeal in abeyance pending the Supreme Court's decision in *Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*. Following the Supreme Court's June 15 decision in Bostock, the Eighth Circuit overturned the district court's ruling that the employee could not move forward on this Title VII claim.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Sellars v. CRST Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 19-2708	11/19/2019 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiffs were female truck drivers for defendant that sued for retaliation and constructive discharge based on defendant's policy that required any sexual harassment complainant to exit the truck, which resulted in them being ineligible for pay for 48 hours. Plaintiffs alleged that in practice this policy often prevented them from receiving any pay until they were on another truck, regardless of whether their wait time exceeded 48 hours. The district court certified a class of all women employed as team truck drivers who were subjected to retaliation as a result of defendant's policy requiring them to exist the truck in response to their complaints of sexual harassment. The district court granted defendant's motion for summary judgment finding that a reasonable jury could not infer the defendant had a retaliatory motive in requiring employees who complain of sexual harassment to exit the truck. The district court also found that plaintiff's constructive discharge claims failed because a reasonable jury could not conclude that defendant deliberately created intolerable working conditions with the intent that any plaintiff would resign her employment.

Issue EEOC is Addressing as Amicus: (1) Does a plaintiff establish causation in a Title VII retaliation case if she shows that her employer has a policy of subjecting employees who complain of sexual harassment to an action that she alleges is adverse, or must she also show that her employer intended to harm her for complaining about harassment? (2) (a) If raised by defendant as an alternative ground for affirmance, did the district court correctly conclude that defendant's pre-July 2015 practice of removing certain drivers who complained of harassment from their trucks without pay was materially adverse for purposes of plaintiffs' Title VII retaliation claims? (b) To show that defendant's subsequent practice of removing drivers who complained of harassment from their trucks and providing "HR layover pay" was materially adverse for purposes of their Title VII retaliation claims, were plaintiffs required to establish that the pay they received was "significantly" or "substantially" less than the pay they otherwise would have earned? (3) Must a plaintiff bringing a Title VII constructive discharge claim prove that her employer deliberately made her working conditions intolerable in an effort to induce her to quit?

EEOC's Position: The EEOC argued the district court erred in granting defendant summary judgment on plaintiffs' retaliation claims because plaintiffs proved their protected conduct was a "but-for" cause of the alleged adverse actions, and there is no requirement that they also must demonstrate defendant acted with malicious retaliatory motive. The EEOC further argued that the district court erred with respect to plaintiffs' retaliation claims because it failed to consider whether employees hired after defendant's policy change would nonetheless reasonably believe they might suffer an adverse consequence for complaining.

The EEOC also argued that the district court erred in granting defendant summary judgment on plaintiffs' constructive discharge claims because the Supreme Court's ruling in *Green v. Brennan*, 136 S. Ct. 1769 (2016) abrogated prior precedent requiring constructive discharge plaintiffs to prove their employer acted with the specific intent of forcing them to resign.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Anthony v. Trax International Corp.	U.S. Court of Appeals for the Ninth Circuit No. 18-15662	7/25/2018 (amicus filed) 4/17/2020 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Plaintiff was hired as a Technical Writer in April of 2010. Her job entailed compiling and formatting information into a technical document based on data provided by test engineers. She had a history of anxiety and PTSD pre-dating her employment with defendant. Plaintiff suffered a flare-up of her PTSD and required time off to recuperate. She requested and was approved for time off in April 2012. Her physician said she would need two weeks off, and thereafter, would require 2-3 hours off per week until May 30. Then, for the next six months, she would likely experience flare-ups, necessitating approximately one day off every three weeks. It appears to be undisputed that the benefits coordinator told plaintiff that she would need a medical release "without restrictions" in order to return to work. Plaintiff was denied return to work with restrictions and was denied her request to work from home. Her employment was terminated thereafter for failing to return from leave with a medical release.

During discovery, plaintiff admitted she lied on her application about having a bachelor's degree, which is a requirement for the technical writer position. Defendant filed for summary judgment, and the district court held that plaintiff could not establish a *prima facie* case of discrimination in violation of the ADA because she could not prove she was qualified based on the after-acquired evidence. The district court stated that it is required to follow a two-prong test under Ninth Circuit case law to determine whether she is qualified: (1) employee must have the technical skills, requisite education, training etc. for the position; and (2) employee must be able to perform the essential functions of the position. Plaintiff could not establish that she was qualified because she did not have the requisite college degree. The district court acknowledged that the after-acquired evidence could not be used to excuse discrimination after a *prima facie* case of discrimination has been established, but determined it could be used to negate one of the required elements (qualification for the position) such that plaintiff could not establish a *prima facie* case. The Supreme Court case *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), addressed employee misconduct during employment in an ADEA case and found that allowing after-acquired evidence of the wrongdoing would limit liability, not excuse employer actions. The district found that *McKennon* was inapplicable to the facts of this case because it determined that in *McKennon*, the Court was establishing an affirmative defense after plaintiff had established a *prima facie* case; here, the employer was seeking to undercut the plaintiff's *prima facie* case, which the district court determined was permissible.

Issue EEOC is Addressing as Amicus: (1) Whether an employer may avoid responsibility for disability discrimination if, during discovery, the employer unearths evidence of wrongdoing by the employee—specifically, "after-acquired" evidence that the victim of the alleged discrimination misrepresented her credentials on her resume or application whenever it was that she applied for the job; and (2) Whether proving "qualification" for a position requires a two-prong test of (a) possessing requisite skill, education, training, etc., and (b) being able to perform the essential functions of the position with or without reasonable accommodation.

EEOC's Position: The EEOC argues that the Supreme Court resolved this issue over 20 years ago in *McKennon*, which involved an ADEA claim. The *McKennon* Court unanimously held that because the employee's wrongdoing played no role in the employer's alleged discriminatory conduct and because the discrimination statutes are designed to eliminate discrimination, not punish errant employees, the evidence may affect relief, but not liability. Following the Supreme Court's holding in *McKennon*, the after-acquired evidence doctrine should only be used to determine the appropriate remedies. Specifically, if the employer proved it would have fired the plaintiff based solely on the wrongdoing uncovered in discovery, the equitable remedies of front pay and reinstatement would normally be inappropriate, and backpay might also be curtailed, although attorney's fees would still be available. But, the Court stated that an "absolute rule barring any recovery … would undermine the ADEA's objective of forcing employers to consider and examine their motives and of penalizing them for employment decisions that spring from age discrimination." *McKennon*, 513 U.S. at 362. The Court concluded that allowing the evidence to limit damages but not liability strikes the appropriate balance between the employer's "legitimate interests" and "the important claims of the employee who invokes the national employment policy mandated by the Act." *Id.* at 361. Although *McKennon* involved employee misconduct and an ADEA claim, the EEOC cites to various extra-jurisdictional cases from other circuits, where the courts have extended the holding in *McKennon* to other types of discrimination cases and to falsification of job applications and resumes based on the policy behind the decision. Moreover, the EEOC points out that virtually any type of wrongdoing, pre-employment or during employment, can be categorized as being unqualified for the position.

The EEOC further argues that the "two-step" test for qualifications that the court inserted into the *prima facie* case is inapplicable where the step one qualifications (education, skill, training, etc., required for the job) had nothing to do with the alleged discriminatory conduct (*i.e.*, where, as here, there is no allegation of failure to hire/discriminatory hiring practices/discriminatory termination based on an alleged lack of qualifications). Under the ADA statute and relevant case law, the employee can show she is qualified if she can do the essential functions of the job, with or without reasonable accommodation. The two-step test could apply where the alleged adverse action turns on the plaintiff's qualifications but should not be applied in cases like this one where the question is whether the employer violated the ADA by requiring that the plaintiff return to work without restrictions or not at all.

Court's Decision: The Ninth Circuit affirmed the district court's grant of summary judgment. The court held that although the Supreme Court in *McKennon* held that after-acquired evidence cannot establish a superseding, non-discriminatory justification for an employer's challenged actions, after-acquired evidence remains available for other purposes, including to show that an individual is not qualified under the ADA. Because plaintiff did not satisfy one of the prerequisites for her position, she is not "otherwise qualified," and the employer was thus not obligated to engage in the interactive process.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Christian v. Umpqua Bank	U.S. Court of Appeals for the Ninth Circuit No. 18-35522	2/12/2019 (amicus filed) 12/31/2020 (decided)	Title VII	Harassment Sex **Result:** Pro-Employee

Background: Plaintiff was employed by defendant in Vancouver, Washington. Plaintiff opened a checking account for a customer in late 2013/early 2014. Plaintiff identified receiving approximately 2-3 notes from the same customer, a flower delivery over Valentine's day in February of 2014, and two page-long, handwritten notes from the customer. The customer did not deliver any of these items directly to plaintiff. Plaintiff also noted that the customer had contacted other bank employees about her. The customer also asked plaintiff for a date, in person, and she said no. Plaintiff told her manager she was frightened and the store manager said he would prohibit the customer from visiting the branch where plaintiff worked, but the manager did not tell the customer this. The customer returned to the branch and asked to open another account in September 2014; the store manager directed plaintiff to do so and when she declined, pointing to the customer's prior behavior, another bank associate opened the account. Plaintiff said it took two hours and he continuously glanced at her, making her uncomfortable. Plaintiff contacted corporate security and Human Resources who began an investigation. Plaintiff went home early for the weekend and stayed out sick for an additional three days. Her manager told her she could hide in the breakroom if she was uncomfortable, pending investigation and a formal trespassing order. When plaintiff returned, she agreed to a transfer to a different branch. After the transfer, she had several documented performance errors. Before a written disciplinary action was delivered to her, she resigned. Plaintiff filed suit for violation of Title VII, alleging sexual harassment (hostile work environment) and retaliation for complaining. The district court granted summary judgment in the bank's favor. First, it determined that a jury could not reasonably deem the customer's conduct severe or pervasive based on the incidents in question, rejecting consideration of any incidents that did not directly involve the plaintiff (*i.e.*, the customer's contact with employees at other branches, or inquiries about her), pointing to a seven-month lapse between the Valentine's Day flower delivery and the customer's September 2014 encounter with plaintiff, and focusing mostly on the customer's September 2014 visit to the bank to open a new account as insufficient to create a hostile work environment. Second, the district court determined that the bank could not be liable for the harassment because it immediately responded to plaintiff's concerns. Third, the court determined that plaintiff could not demonstrate she engaged in protected opposition activity when she complained about the customer's conduct to bank management and the bank's alleged failure to remedy the conduct. The court also stated that the complaints were not protected because the customer's conduct could not be imputed to the bank and because plaintiff did not identify any materially adverse employment actions, and she failed to establish a causal link between her complaints and the employment actions in question.

Issues EEOC is Addressing as Amicus: Whether the district court erred in granting summary judgment on the plaintiff's hostile work environment claim because a jury could conclude that a reasonable woman in plaintiff's position would deem the customer's conduct objectively hostile, and that her employer was liable for the hostile work environment created by the customer. Whether the district court also erred in granting summary judgment on the plaintiff's retaliation claim when it determined that she had not engaged in protected opposition activity.

EEOC's Position: The district court erred when focusing on a single incident that it deemed insufficient to constitute a hostile workplace—the plaintiff's September 2014 visit to open a new account—because although plaintiff may not have been physically present for delivery of notes, flowers, and the customer's communications with her co-workers at her branch and another bank branch, his behavior can still create a hostile work environment for her. The district court should have assessed the customer's behavior as stalking, which has regularly been considered by courts as examples of conduct that may contribute to a hostile work environment. The court should have considered the fact that romantic overtures can be harassing, analogizing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), where the romantic overtures perpetuated by the plaintiff's co-worker were such that a reasonable woman could have considered the co-worker's conduct sufficiently severe and pervasive to create an abusive working environment. The district court also should have considered other individuals' assessments of the customer's conduct as evidence that plaintiff's reaction was well-founded. The district court also erred in concluding that the temporal gap between the incidents in February 2014 and September 2014 indicated that the conduct was not severe or pervasive because a reasonable jury could find that the time did not dilute the cumulative effect of the customer's conduct as a whole. A reasonable jury also could have concluded that defendant's actions were not reasonably calculated to end the harassment because the manager did not take personally take action and tell the customer he was no longer welcome at the branch or that it was inappropriate for him to send plaintiff flowers in February 2014 and the customer was permitted to come to the branch and open up a separate account, despite defendant's actions to take out a trespassing order and investigate plaintiff's concerns in September 2014. A reasonable jury could also find that placing the burden on plaintiff to manage the issue and recommend solutions, including requiring her to transfer, was an inadequate response. A reasonable jury could also have determined that plaintiff held a reasonable belief that she was being subjected to workplace harassment based on the actions of the customer when she complained to her employer and that it was reasonable for her to believe that her employer had an obligation to intervene when she complained.

Court's Decision: The Ninth Circuit reversed and remanding, finding that the district court "erred in isolating the harassing incidents of September 2014 from those of February 2014. They should be evaluated together. . . The district court's overly narrow approach—which ignored the reality 'that a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations'—was error." In addition, the Ninth Circuit found the lower court erred in declining to consider incidents in which the complainant did not have direct interactions with the customer/harasser. Finally, the appellate court found that the district court also erred in neglecting to consider record evidence of interactions between the customer and third persons. As for liability, the court determined there was sufficient evidence to create a genuine issue of material fact as to the adequacy of the employer's response.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
McAllister v. Adecco	U.S. Court of Appeals for the Ninth Circuit No. 18-17393	8/16/2019 (amicus filed) 7/20/2020 (decided)	Title VII	Retaliation **Result:** Pro-Employer

Background: Plaintiff worked for a staffing agency, which assigned him to a temporary assignment with another company. Plaintiff complained to the staffing agency about assignments and interactions from his manager, believing they were "tricking" him and might not want to work with him because he is Black. Plaintiff submitted two more e-mails to this effect. The matter was escalated to a staffing agency HR representative out of Florida. The HR representative contacted plaintiff several times to investigate his allegations and also asked if he still wanted to accept assignments from the staffing agency. He said the matter was with the EEOC. He confirmed he wished to continue to receive assignments from the staffing agency. He did not participate in the internal investigation, and he did not confirm further assignments that were communicated to him and in accordance with company policy, was placed on "inactive" status. The district court granted summary judgment in the staffing agency's favor, finding that the plaintiff would be unable to establish (1) the staffing agency's liability for client's alleged racially discriminatory, harassing, or retaliatory conduct; (2) *prima facie* cases of race-based discrimination and retaliation by the staffing agency or that the staffing agency's reasons for its actions were pretextual, (3) racially harassing conduct by the staffing agency; and (4) that the manager acted with racial animus or participated in any racially discriminatory act. Plaintiff appealed.

Issues EEOC is Addressing as Amicus: Whether Title VII prohibits retaliation for the filing of a charge regardless of the merits of the charge; whether the district court applied the wrong legal standard to determine whether the staffing agency subjected plaintiff to an adverse action for filing a charge; and whether the district court erred in finding that the staffing agency could not be held liable for alleged discriminatory conduct occurring during plaintiff's placement at the client.

EEOC's Position: The court erred as a matter of law in applying the reasonableness test to the participation clause of the anti-retaliation provision of Title VII, because no such test is required once an individual files a charge. The district court erred by not applying the more expansive, broader adverse action test available for retaliation claims (rather than the more narrow test for substantive discrimination claims), which would include a failure to investigate. The district court erred in only analyzing the facts of the case under a joint employer analysis rather than, as the facts support here, the staffing agency's negligence in allowing a third party to discriminate against plaintiff at his workplace.

Court's Decision: The Ninth Circuit, in an unpublished opinion, affirmed the lower court's decision. The appellate court did not, however, consider the arguments raised in the EEOC's amicus brief, as the appellant did not raise that issue in his opening brief.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Exby-Stolley v. Board of County Commissioners	U.S. Court of Appeals for the Tenth Circuit No. 16-1412	3/1/2019 (amicus filed) 10/28/2020 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff worked as a health inspector for the County and alleged that she suffered an injury that left her without full use of her right arm. After this injury, plaintiff's work performance began to suffer as her inspections took longer, and she could not complete the number of inspections that her position required. Plaintiff was given a temporary part-time assignment while she and the County discussed longer-term accommodations. Plaintiff ultimately resigned from her employment with the County and filed suit in 2013. At trial, plaintiff asserted that after numerous meetings with the County to discuss her injury and attempts to find a long-term accommodation, her supervisor told her to resign. For its part, the County asserted that plaintiff had voluntarily resigned mid-way through its process for determining what permanent accommodations could be made for her. The sole claim on which the district court instructed the jury was plaintiff's failure-to-accommodate claim under Title I of the ADA. The district court instructed the jury that plaintiff had to demonstrate that she "was discharged from employment or suffered another adverse employment action." The court further instructed the jury that, "[a]n adverse employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The district court then provided the jury with a seven-question special interrogatory verdict form for this claim. At Question 3, the jury found that plaintiff had not "proven by a preponderance of the evidence that she was [discharged from employment][not promoted][or other adverse action] by [the County]." This finding against plaintiff meant that the jury "found for the Defendant" as to plaintiff's failure-to accommodate claim.

On appeal, plaintiff asserted that the district court erred by "instructing the jury that she had to prove she had suffered an adverse employment action" to prevail on her Title I failure-to-accommodate claim.

Issues EEOC is Addressing as Amicus: Whether the district court erred in instructing the jury that to prevail on a failure-to-accommodate claim under Title I of the ADA, the plaintiff had to prove that she suffered an "adverse employment action," which the court defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

EEOC's Position: The EEOC took the position that the district court erred in instructing the jury that to prevail on her Title I failure-to-accommodate claim, plaintiff had to prove an "adverse employment action," which it defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In support of its position, the EEOC argued that the district court's instruction that plaintiff must prove an "adverse employment action" appears nowhere in the text of Title I. The EEOC also argued that the district court's "adverse employment action" instruction in this case too narrowly construed Title I's text and undermined its purpose. Here, the EEOC argued that, under the district court's framework, there would be no violation of Title I unless a failure to provide a reasonable accommodation results in "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The EEOC also argued that the panel majority's suggestion that the term "adverse employment action" can be read as mere "judicial shorthand" for the statutory phrase "terms, conditions, and privileges of employment" could be accurate if courts truly treated "adverse employment action" as synonymous with the statutory language. Here, the EEOC stated that many courts, including the district court, construe "adverse employment action" far more narrowly than actions that pertain to the "terms, conditions, and privileges of employment," and that such a narrow interpretation not only conflicts with Title I's text, but it also defeats its purpose. Specifically, it would defeat the ADA's purpose of furthering "integration of persons with disabilities into the economic and social mainstream," to require that disabled employees suffer an "adverse employment action,"—*i.e.*, termination or other significant change in employment status—before they could enforce Title I's requirement that employers reasonably accommodate their known disabilities.

Court's Decision: A divided panel of the appellate court had rejected this argument, finding that an "adverse employment action—that is, a materially adverse decision regarding 'application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment'—is an element of all discrimination claims under the ADA." On December 18, 2019, the Tenth Circuit granted rehearing *en banc*. On October 28, 2020, the full Tenth Circuit reversed itself, finding that an adverse employment action *is not* a required element of an ADA failure-to-accommodate claim. "It is undisputed that the language 'adverse employment action' does not expressly appear in the plain terms of the failure-to-accommodate statutory provision, § 12112(b)(5)(A), nor in the 'General rule' of § 12112(a) that the failure-to-accommodate provision particularizes." The court therefore concluded that the lower court "erred when it charged the jury that an adverse employment action is a requisite element of a failure-to-accommodate claim."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Frappied v. Affinity Gaming Black Hawk, LLC	U.S. Court of Appeals for the Tenth Circuit No. 19-1063	6/11/2019 (amicus filed) 7/21/2020 (decided)	ADEA Title VII	Age Sex **Result:** Pro-Employee
Background: Plaintiffs, eight women and one man ages 46-74, worked at a casino that defendant purchased in 2012. Upon the purchase, defendant required all employees to reapply for their jobs and each plaintiff re-applied and was re-hired, subject to a 90-day probationary period. Before the 90-day period lapsed, defendant posted 59 job openings. Around the same time, defendant required all employees to undergo training on its service philosophy. After competition of the required training, defendant began discharging employees from its casino, including all plaintiffs, and then began replacing its laid-off employees. Plaintiffs allege sex discrimination claims against older women under Title VII, age discrimination under the ADEA, age-based disparate treatment, and disparate impact claims under the ADEA. The court granted defendant's motion to dismiss as to its sex discrimination claim, disparate impact under the ADEA, and disparate impact under Title VII. As to the gender discrimination claim, the court found that plaintiffs did not provide fair notice of their sex-plus-age claim, which is "effectively an attempt to have a spare bullet in plaintiffs' chamber should its standalone age discrimination claim fail." Further, the court determined that plaintiffs did not establish a *prima facie* case of age discrimination under the ADEA because defendant did not eliminate plaintiffs' positions after terminating their employment. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred in dismissing plaintiffs' Title VII sex discrimination claim against older women because such claims are cognizable under Title VII and whether plaintiffs' complaint provided defendant "fair notice" of the nature of their Title VII disparate treatment claims; and (2) Whether the district court erred in holding that plaintiffs could not establish the fourth prong of a *prima facie* case under the ADEA where defendant admitted plaintiffs' jobs remained open after it terminated their employment. **EEOC's Position:** The EEOC argues that "sex-plus" claims under Title VII are cognizable, regardless of whether the "plus" characteristic, age, is protected by another statute that plaintiffs also invoked in a separate claim. In support of that argument, the EEOC relies on other district court opinions accepting Title VII sex-plus claims where age is the "plus" factor. In addition, the EEOC argues the complaint provided "fair notice" of plaintiffs' Title VII disparate treatment claim because the complaint details the circumstances under which plaintiffs were fired. Finally, the EEOC argues that both Supreme Court and Tenth Circuit precedent allow a flexible approach to the *prima facie* case of age discrimination under the ADEA in that plaintiffs can show their jobs were not eliminated after their employment ended or that plaintiffs were replaced by a younger comparator. **Court's Decision:** The Tenth Circuit affirmed the dismissal of the Title VII disparate treatment claim, but reversed and remanded the remaining claims, finding "sex-plus" claims cognizable under Title VII, regardless of whether the secondary characteristic is protected under Title VII. Citing the Supreme Court's decision in *Bostock v. Clayton County*, the Tenth Circuit reiterated that when determining whether a person is subjected to discrimination under Title VII, "our focus should be on individuals, not groups." *Frappied v. Affinity Gaming*, No. 19-1063, slip op. at 7 (10th Cir. July 21, 2020), *citing Bostock v. Clayton County*, 140 S.Ct. 1731, 1740 (2020).				
Tesone v. Empire Marketing Strategies	U.S. Court of Appeals for the Tenth Circuit No. 19-1026	5/13/2019 (amicus filed) 11/8/2019 (decided)	ADA	Disability **Result:** Pro-Employee
Background: Plaintiff sued alleging disability discrimination and wrongful termination in violation of the Americans with Disabilities Act. Plaintiff was a Produce Retail Sales Merchandizer and suffered from back pain and muscle weakness that limited her ability to lift. She claimed to have informed defendant of her lifting limitations when she was hired. Despite plaintiff's lifting limitation, defendant reprimanded her inability to lift, complained she was slow in performing her work duties, which required lifting, and finally terminated her employment for substandard performance. The district court rejected plaintiff's claims and granted defendant summary judgment holding that plaintiff failed to submit expert medical evidence of a substantial impairment of a major life activity. Issue EEOC is Addressing as Amicus: Whether the ADA ordinarily requires expert medical evidence to establish a disability. **EEOC's Position:** The EEOC argues that disabled status under the ADA does not ordinarily require medical evidence of the extent of the injury. In some rare circumstances where the impairment is unique and uncommon, such information would be necessary to establish the existence of a qualifying medical condition. However, in others, a lay jury can determine this status without detailed medical evidence. The EEOC contends that under the ADAAA, the threshold for claiming disability was reduced to the point where juries can decide these issues without expert testimony or evidence. **Court's Decision:** The Tenth Circuit affirmed the district court's denial of the plaintiff's motions to amend, but determined the district court erred in granting summary judgment in favor of the defendant, as the ADA does not always require medical experts.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Durham v. Rural/Metro Corporation	U.S. Court of Appeals for the Eleventh Circuit No. 18-14687	2/11/2019 (amicus filed) 4/17/2020 (decided)	Title VII	Pregnancy **Result:** Pro-Employee

Background: Plaintiff worked as an emergency medical technician (EMT) for the defendant. Plaintiff submitted a physician's note to defendant stating she could not lift 50 pounds or more due to her pregnancy. Defendant subsequently denied plaintiff light-duty work due to its policy that only employees injured on the job may obtain light-duty work. After defendant offered unpaid leave, plaintiff subsequently claimed she was constructively discharged and filed suit for pregnancy discrimination. The district court dismissed the case on the grounds that plaintiff failed to establish that defendant intentionally treated her less favorably than non-pregnant workers, reasoning that the only employees permitted light-duty work were injured on the job.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in holding that plaintiff failed to establish a *prima facie* case of pregnancy discrimination where she presented evidence that defendant routinely accommodated non-pregnant employees who were similar in their inability to work; and (2) Whether the district court erred in failing to send plaintiff's case to the jury when defendant did not provide a reason for its policy of only accommodating workers who were injured on the job.

EEOC's Position: The EEOC argued that the district court erred when it required that plaintiff show non-pregnant workers who were uninjured on the job to meet her *prima facie* burden. Specifically, the EEOC contended that evidence that non-pregnant workers received light duty was sufficient. The EEOC also argued that defendant had a burden to present a legitimate nondiscriminatory reason for its policy of only providing light duty to employees injured on the job.

Court's Decision: The Eleventh Circuit vacated the district court's grant of the employer's motion for summary judgment, holding that the district court erroneously factored into the "similar in their ability or inability to work" evaluation the distinct, post-prima-facie-case consideration of the employer's purported legitimate, non-discriminatory reasons for treating plaintiff and the non-pregnant employees differently. The court explained that neither a non-pregnant EMT who is limited to lifting 10 or 20 pounds nor a pregnant EMT who is restricted to lifting 50 pounds or less can lift the required 100 pounds to serve as an EMT. Consequently, neither can meet the lifting requirement and are thus the same in their "inability to work" as an EMT. Plaintiff satisfied her *prima facie* case requirement to establish that she was similarly situated to other employees in their ability or inability to work. The court remanded for the district court to determine the remaining issues.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Gogel v. Kia Motors Manufacturing Georgia, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 16-16850	8/30/2019 (amicus filed) 7/29/2020 (decided)	Title VII	Retaliation **Result:** Pro-Employer

Background: Plaintiff began working for defendant in 2008 as Team Relations Manager. In March 2009, defendant announced organizational changes and named several managers Head of Department (HOD) for their respective departments. Plaintiff observed that defendant designated all the male senior managers as HODs, and that she was the only senior manager who did not become HOD of her department. Between March 2009 and November 2010, the plaintiff complained to her supervisors that she believed defendant was treating her differently because of her sex. On November 10, 2010, plaintiff filed an EEOC charge alleging that defendant discriminatorily denied her the HOD position based on sex and national origin.

On Friday, December 3, 2010, the defendant presented the plaintiff with a document that sought her agreement to refrain from encouraging or soliciting other employees to make claims against the company. When plaintiff explained that she did not feel comfortable signing the document until her attorney reviewed it, she was asked to go home. Plaintiff signed the document the following Monday.

On January 19, the defendant fired the plaintiff because it believed she was soliciting other employees to make claims against the company.

The district court granted summary judgment to the defendant on the plaintiff's Title VII and 42 U.S.C. § 1981 retaliation claims, agreeing with the magistrate judge that (1) defendant had stated a legitimate "non-retaliatory" reason for firing plaintiff (it "lost confidence in plaintiff's abilities to perform her job duties after an investigation showed that she had solicited another employee to file a charge") and (2) plaintiff could not establish pretext because she failed to present evidence that defendant did not "honestly believe[] that plaintiff had solicited another employee."

An Eleventh Circuit panel reversed summary judgment on plaintiff's retaliation claim. *Gogel v. Kia Motors Mfg. of Ga., Inc.*, No. 16-16850, slip op. at 2 (11th Cir. Sept. 24, 2018). In contrast to the magistrate judge's report and the district court's opinion, the panel decisions centered on whether the "manner" of plaintiff's opposition was "reasonable," relying on *Rollins v. Florida Department of Law Enforcement*, 868 F.2d 397 (11th Cir. 1989). *Gogel*, slip op. at 15 (quoting *Rollins*, 868 F.2d at 401). As the majority explained, this court assesses whether the manner of opposition was reasonable by balancing "the purpose of the statute and the need to protect individuals asserting their rights [ ] against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." *Id.* (quoting *Rollins*, 868 F.2d at 401).

The majority concluded that plaintiff's assistance to another employee qualified as protected opposition. At the outset, the panel majority determined that, under a plain text reading, Title VII's anti-retaliation provision does not exempt managerial or human resource employees. *Id.* at 17, 25 (quoting 42 U.S.C. § 2000e-3(a)). Next, applying the balancing test articulated in *Rollins*, the panel majority concluded that the manner of plaintiff's opposition was reasonable. The majority distinguished prior decisions that deemed the manner of opposition conduct unreasonable because employees "alleged[ly] . . . violated their employer's procedures for reporting complaints," including *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980), *Hamm v. Board of Regents*, 708 F.2d 647 (11th Cir. 1983), and *Jones*, on which the district court relied. See *Gogel*, slip op. at 15-17, 19-20, 24-25. The panel majority concluded that the balancing test favored the plaintiff, emphasizing that she did not significantly diverge from the defendant's procedures, that the plaintiff had unsuccessfully attempted to use defendant's internal procedures to address discrimination complaints, and that any apparent "conflict" between human resource employees' job duties and their "support[] [for] coworkers' oppositional conduct" was "overstated." *Id.* at 18, 20, 21-22.

Issues EEOC is Addressing as Amicus: Whether the district court erred when it granted summary judgment for defendant on plaintiff's retaliation claim, where defendant fired plaintiff after she filed an EEOC charge, and where defendant stated that it fired plaintiff because, in the company's view, she assisted another employee in filing an EEOC charge.

EEOC's Position: The EEOC agreed with the panel majority that the district court erred in granting summary judgment on plaintiff's Title VII retaliation claim. The EEOC stated that a reasonable jury could find that the defendant fired the plaintiff because of her assistance to the other employee. Here, the EEOC also argued that the panel majority correctly determined that the plaintiff's status as a human resource manager did not exempt her from Title VII's anti-retaliation protections because the statutory text covers "any . . . employee[]" and "contains no exception for human resource employees." *Gogel*, slip op. at 17, 25 (quoting 42 U.S.C. § 2000e-3(a)). In support of this argument, the EEOC noted that because Title VII's anti-retaliation provision provide no basis for exempting managers or human resource personnel, "focus[ing] on an employee's job duties, rather than the oppositional nature of the employee's complaints or criticisms, is inapposite in the context of Title VII retaliation claims." *Littlejohn*, 795 F.3d at 317 n.16.

The EEOC also argued that the so-called "honest belief" doctrine does not apply in this case, where defendant's stated justification for terminating the plaintiff's employment was her protected activity, not misconduct. Here, the EEOC argued that defendant's stated reason for firing the plaintiff was not based on legitimately sanctionable misconduct independent from her protected activity, but rather precisely because of—and for no other reason than—her protected activity. Relying on prior Eleventh Circuit decisions, the EEOC stated that it is not a legitimate, non-retaliatory reason to fire an employee who has complained of discrimination because the company thinks the employee is "unhappy working for the company" given the complaint, or that it would be "awkward and counterproductive" to retain her. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1269 (11th Cir. 2010); *see also Id.* at 1269-70 (adding that an employer's fear that an employee who engaged in opposition might sabotage the company is not a legitimate, non-retaliatory reason for termination, absent a "reasonable, fact-based fear of sabotage or violence").

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Court's Decision: The Eleventh Circuit narrowly affirmed the district court's grant of summary judgment on the plaintiff's retaliation claim, finding the plaintiff-manager lost protection of Title VII's opposition clause by encouraging an employee to file suit against the company. The court noted that "an employee's oppositional conduct loses its protection when the manner chosen to voice that opposition so interferes with the employee's performance of her job that it renders her ineffective in the position for which she was employed. And . . . that is what happened in this case." Specifically, the manager's efforts to recruit an employee to sue the company "so clearly conflicted with the performance of her job duties as the manager of the Team Relations department that it rendered her ineffective in that position and reasonably prompted [the employer] to conclude that it could no longer trust her" to do her job.				
Thompson v. DeKalb County, Georgia	U.S. Court of Appeals for the Eleventh Circuit No. 19-11260	7/5/2019 (amicus filed)	ADEA Title VII	Age Race **Result:** Pending
Background: Plaintiff worked for defendant as an attorney in its law department assisting with civil matters. After being promoted to Senior Assistant County Attorney, plaintiff defended the county in a breach of contract case by a county contractor. In his investigation into that case, plaintiff discovered the county contractor defrauded the county with the assistance from a county employee. In 2013, a new county attorney was appointed, and she divided the department's attorneys into four teams, each with a different focus. The county attorney stated in staff meetings she wanted to hire "baby lawyers" and planned to "fill the nursery" with them. Meanwhile, plaintiff continued defending the county in the breach of contract case, but as the case became more complex, the new county attorney hired outside counsel for assistance. Plaintiff disagreed with opposing counsel over appellate strategy and asked to withdraw from the case. The county contractor ultimately requested attorney's fees against the county and plaintiff individually, so plaintiff sought the advice of outside counsel and the county attorney. There was disagreement during that meeting, the new county attorney advised plaintiff to find a new job, and plaintiff was fired three weeks later. After plaintiff's departure, defendant redistributed plaintiff's caseload among the remaining attorneys and hired a younger attorney to assign other responsibilities. Plaintiff filed suit against defendant alleging violations of the Georgia Whistleblower Act, race discrimination under Title VII, and age discrimination under the ADEA. After discovery, defendant moved for summary judgment. The district court adopted the magistrate judge's recommendation and granted summary judgment in favor of defendant on plaintiff's ADEA claim, reasoning that plaintiff did not show he was replaced by someone outside the protected class or treated less favorably than similarly-situated individuals outside the protected class. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court wrongly held that plaintiff failed to establish a *prima facie* case of age discrimination for summary judgment purposes because the next attorney hired, although 24 years younger, was not assigned plaintiff's former caseload; and (2) Whether the district court erred in failing to consider as circumstantial evidence of discrimination (a) repeated statements by the county attorney responsible for firing plaintiff that reflected age bias and (b) evidence that the county attorney consistently replaced departing older attorneys with attorneys in their thirties. **EEOC's Position:** The EEOC argued that a plaintiff's burden to establish a *prima facie* case of discrimination under the ADEA is minimal and intended to be applied flexibly. More specifically, the EEOC argued that it was error for the district court to conclude that the attorney hired after plaintiff's termination was not a replacement because he did not inherit the exact same cases. Further, the EEOC argued that plaintiff set forth a "convincing mosaic" argument the age discrimination motived the termination decision, but the district court only addressed part of the evidence. **Court's Decision:** Oral argument was held on July 28, 2020.				

FY 2020 – Select Appellate Cases in Which the EEOC was a Party

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
R.G. & G.R. Harris Funeral Homes v. EEOC	U.S. Supreme Court No. 18-107	4/22/2019 (cert. granted) 6/15/2020 (decided)	Title VII	Gender Identity Discrimination **Result:** Pro-EEOC

Background: A transgender woman initially presented as a man who worked for a funeral home as an embalmer. During her employment, she notified her supervisor that she was transgender and would undergo gender-reassignment surgery to present as a woman. The funeral home also applied a very specific gender-based dress benefit through which it supplied male employees with suits and ties but rarely gave female employees any such privileges. When employee returned after surgery, defendant terminated her employment.

The EEOC filed a complaint alleging that the funeral home fired the employee because she transitioned from male to female and did not conform with the funeral home's gender-based dress policy or stereotypes and only provided a clothing benefit to men. Although the district court found that transgender status is not protected under Title VII, it found that the employee stated a claim for relief under the act based on unlawful sex-based stereotyping. Subsequently, the funeral home filed an amended answer alleging the Religious Freedom Restoration Act defense under Title VII, *i.e.,* permitting the employee to continue employment would violate closely held religious beliefs. The district court granted summary judgment to the funeral home on the basis of this defense.

The Sixth Circuit reversed the district court's grant of summary judgment. Specifically, the Sixth Circuit determined that (1) the funeral home engaged in unlawful discrimination against the ex-employee on the basis of her sex; (2) the funeral home has not established that applying Title VII's proscriptions against sex discrimination to the funeral home would substantially burden the owner's religious exercise, and therefore the funeral home is not entitled to a defense under RFRA; (3) even if the owner's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against the ex-employee; and (4) the EEOC may bring a discriminatory clothing allowance claim in this case because such an investigation into the funeral home's clothing allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Appellant submitted to the EEOC. Importantly, the Sixth Circuit expressly held that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" (884 F.3d 560, 571) and "discrimination on the basis of transgender and transitioning status violates Title VII" (*Id.* at 574-575).

Issues on Appeal: (1) Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964; and (2) Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

EEOC's Position on Appeal: Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on transgender status and/or transitioning as outlined in the text of Title VII and decisions of the Supreme Court that have long recognized that Title VII forbids employment decisions based on gender. The court also erred in ruling that RFRA provides the funeral home a defense to the EEOC's enforcement action in this case. Title VII permits religious organizations to prefer employees who hold the same religious beliefs, and the judicially created "ministerial exception" prohibits application of federal anti-discrimination laws to the employment relationship between a religious institution and its ministers. Neither exception applies here. RFRA does not provide a defense that exempts the funeral home from complying with Title VII's prohibition on sex discrimination based on the sincere religious beliefs of its owner. That is because the funeral home failed to meet its initial burden of showing that the EEOC's enforcement action imposed a "substantial burden" on the company's "exercise of religion."

Court's Decision: The Supreme Court consolidated this case with two related cases: *Zarda v. Altitude Express, Inc., Bostock v. Clayton County*. On June 15, 2020, in a 6 to 3 ruling, the Supreme Court held Title VII prohibits discrimination based on sexual orientation and gender identity. The High Court reasoned, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The Court explained that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." Accordingly, the Court concluded, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

In reaching this conclusion, the Court rejected the argument that "sex" is limited to the biological distinctions between men and women. Looking to the text of Title VII, the Court reasoned that the statute prohibits employers from discriminating against the individual "because of sex," which encompasses actions taken by employers against employees who display attributes that it would tolerate if they were exhibited by an individual of the other sex. The Court explained that Title VII is written in "starkly broad terms" and, as a result, this "elephant has never hidden in a mousehole; it has been standing before us all along."

Following the Supreme Court's decision, the EEOC and R.G. & G.R. Harris Funeral Homes settled their lawsuit for $250,000.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Ryan's Pointe Houston	U.S. Court of Appeals for the Fifth Circuit No. 19-20656	11/12/2019 (appeal filed)	Title VII	National Origin Pregnancy **Result:** Pending

Background: Plaintiff alleged defendant terminated her because of her national origin and pregnancy. Plaintiff alleged that a coworker told her management "really p***** off that the entire staff was Mexican." Plaintiff also alleged that the majority owner of defendant used racial epithets in describing the defendants' tenants. Plaintiff also alleges she was told by defendant's employees that it would be in her best interest professionally to get an abortion after she announced she was pregnant. Plaintiff also alleged that shortly before her termination, the majority owner of defendant expressed a desire to have a staff that was "very fit, tall, thin, blonde hair." The district court granted summary judgment for defendant, holding that the EEOC could not establish a *prima facie* case because plaintiff was not qualified for her position. Specifically, the court reasoned that defendant hired plaintiff only after she misrepresented her previous managerial experience. The court also noted that defendant's knowledge of plaintiff's Hispanic heritage when it hired her and fact that she was preceded and succeeded by a women belies any inference of discriminatory pretext.

Issue on Appeal: (1) Did the EEOC introduce sufficient direct and circumstantial evidence of discrimination to support a jury finding that defendant fired plaintiff because of her national origin and/or pregnancy in violation of Title VII? (2) Did the district court erroneously conclude that defendants could not have discriminated against plaintiff because her predecessor and successor were both women?

EEOC's Position on Appeal: The EEOC argued that it presented direct evidence of discrimination to defeat summary judgment in management's comments about wanting to hire White employees. The EEOC also argued that management's negative comments about other Mexican employees and tenants were sufficient circumstantial evidence to find national origin discrimination. Further, the EEOC contended that the district court improperly relied on the after-acquired evidence that plaintiff lied on her application, noting such evidence can only limit relief, not liability. Lastly, the EEOC argued that the same actor inference was properly refuted by the direct and circumstantial evidence discussed above and the fact that defendant hired other women does not prevent any inference of discrimination based on plaintiff's pregnancy status.

Court's Decision: Pending.

EEOC v. Vantage Energy Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 19-20541	9/13/2019 (appeal filed) 4/3/2020 (decided)	ADA	Charge Processing **Result:** Pro-EEOC

Background: The EEOC sued defendant alleging that it violated the Americans with Disabilities Act by terminating an employee because he had a heart attack on board one of its drilling rigs. The company purportedly fired the employee after he suffered a heart attack at work and the heart attack resulted in an impairment to the employee's cardiovascular system, which necessitated that he take short-term disability leave. Defendant discharged him immediately upon his being released to return to work. The district court never reached the merits of the case because it dismissed the action as time-barred since plaintiff did not file an official EEOC charge form within 300 days of his termination. Instead, the employee's attorneys submitted an EEOC Form 283 intake questionnaire and accompanying letter outlining his complaint, and thanking the EEOC for reviewing his complaints of discrimination against defendant. The letter and questionnaire contained the same information required by the official charge.

Issue on Appeal: Whether a completed but unverified EEOC intake questionnaire constitutes a charge of discrimination under the ADEA for timely filling purposes.

EEOC's Position on Appeal: The EEOC argues that the district court erroneously concluded that plaintiff did not timely file a charge of discrimination because the Supreme Court has concluded that intake questionnaires and other documents can be charges, for timely filling purposes, if they contain the information required by the EEOC for a charge and can be reasonably interpreted as a request for the EEOC to take remedial action. Moreover, verification may occur after the filing period. Thus, the EEOC argues that it is irrelevant that plaintiff's EEOC charge was not submitted on an official EEOC charge form because his informal questionnaire and letter provided the same information required by the official form. The required information included an allegation that defendant violated the ADA by terminating the employee because he had suffered a heart attack at work. The EEOC also argues that the employee's questionnaire is evidence he intended to activate the administrative process.

Court's Decision: The Fifth Circuit reversed the district court's dismissal and remanded, holding that the "EEOC intake questionnaire was sufficient as a charge and, although verified outside of the filing period, was 'timely' by virtue of the relation-back regulation." The court acknowledged that the "dilatory" response of the charging party's counsel to the EEOC's months-long requests to file the verified charge was inexcusable, and counsel should never ignore applicable Americans with Disabilities law and regulations. The Supreme Court's decisions in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002) and *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008) "were designed to accomplish fair and efficient resolution of discrimination complaints filed more often than not by pro se individuals. That a plaintiff represented by counsel benefits from the Court's leniency is unfortunate." On July 2, 2020, Vantage Energy Services filed a petition for a *writ of certiorari* with the U.S. Supreme Court. The Court denied the petition on January 11, 2021.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. West Meade Place, LLP	U.S. Court of Appeals for the Sixth Circuit No. 19-6469	4/24/2020 (appeal filed) 2/8/2020 (decided)	ADA	Disability **Result:** Pro-EEOC

Background: Employee worked as a laundry assistant for defendant, a rehabilitation and healthcare center, from February 2015, until her termination in November 2015. Employee was diagnosed with an anxiety disorder by her physician prior to her employment with defendant. During her employment, employee submitted a form that was intended to provide medical documentation for leave requested under the Family and Medical Leave Act. The form stated that the employee was "not able to work during flare-ups/episodes" and that she would need 1-3 days of leave per month. Employee was told she did not qualify for FMLA leave because she had worked for defendant for less than 12 months, but met with her supervisor to discuss taking intermittent leave. Following this meeting, employee's supervisor believed that she was subject to significant restrictions and would need a medical release to work. Because the employee did not have a medical release, her job was terminated on the basis that she was unable to perform her job duties. The EEOC filed suit on the employee's behalf, alleging that defendant violated the ADA by terminating employee on the basis of her disability and by denying her reasonable accommodation for her anxiety disorder. The district court concluded that no reasonable jury could find that employee met any of the three statutory definitions of "disability," and granted summary judgment to defendant.

Issue on Appeal: Could a reasonable jury conclude that defendant regarded employee as having an impairment, thus satisfying the third prong of the definition of "disability" in the amended ADA, based on evidence showing that defendant terminated the employee because it believed she had an anxiety disorder or another serious medical condition that rendered her unable to perform her job functions?

EEOC's Position on Appeal: The EEOC argued that a reasonable jury could determine that defendant regarded the employee as having an impairment under the ADA based on evidence the decision-maker terminated her employment because of an actual or perceived impairment. The EEOC also argued that a jury could find that the record supports the conclusion that the decision-maker terminated the employee's employment based on her belief that an anxiety disorder or another serious medical condition would preclude the employee from working and rose to the level of an impairment. Based on this, the EEOC argued that the district court erred by improperly weighing the evidence itself rather than asking whether the evidence presented a sufficient disagreement to require submission to a jury. The EEOC also noted that the district court required it to make certain showings that are unnecessary under the ADA.

Court's Decision: The Sixth Circuit reversed the grant of summary judgment to the employer, finding there were genuine issues of material fact outstanding and that a reasonable jury could find that the employer regarded the employee as having an impairment.

EEOC v. CRST Van Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 18-1446	6/8/2018 (appeal filed) 12/10/2019 (decided)	Title VII	Attorneys' Fees Harassment Sex **Result:** Pro-Employer

Background: CRST was awarded $3.3 million in attorney's fees from the EEOC after prevailing at the district court level. CRST alleged that they were entitled to a fee award as a prevailing party.

Issues on Appeal: Whether the district court abused its discretion in awarding $3.3 million in attorney's fees in the Title VII enforcement action.

EEOC's Position on Appeal: The EEOC argued that simply because the defendant prevailed in the district court Title VII action does not necessarily entitle defendant to a fee award. Instead, the EEOC argued that in order to be entitled to fees, the EEOC action would needed to have been "frivolous, unreasonable, or without foundation." The EEOC asserted that it was not required to investigate each individual's claim in a class of claimants, and the investigation into the widespread practices of defendant as a whole was sufficient for the EEOC to have found that the claim was not meritless. Further, the EEOC argued that it had a non-frivolous basis to believe each of the claims asserted in the action, and thus defendant was not entitled to a fee award.

Court's Decision: A three-judge panel of the Eighth Circuit upheld the fee award, finding the district court did not abuse its discretion in applying the standard set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). According to the panel, "[t]he district court's finding that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims is consistent with this court's prior observation that the EEOC 'wholly failed to satisfy its statutory presuit obligations.' The EEOC could not hold a reasonable belief that it satisfied its presuit obligations when it 'wholly failed to satisfy' them." *CRST Van Expedited v. EEOC*, 2019 U.S. App. LEXIS 36511 at *11 (8th Cir. Dec. 10, 2019) (internal citations omitted).

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Global Horizons, Inc.	U.S. Court of Appeals for the Ninth Circuit No. 20-35434	5/20/2020 (appeal filed)	Title VII	Race National Origin **Result:** Dismissed (settled)

Background: In 2004 and 2005, Global Horizons, Inc. ("Global"), a labor contractor, was contracted by Green Acre Farms and Valley Fruit Orchards (the "Growers") to provide temporary foreign farmworkers. Global recruited farmworkers from Thailand to perform work related to the Global's contract with the Growers. After receiving charges from two of the Thai farmworkers alleging discrimination based on race and/or national origin, the EEOC opened an investigation and found reasonable cause to believe the farmworkers' allegations. Following unsuccessful conciliation, the EEOC filed a Title VII lawsuit. The district court entered default judgment against Global. The district court also dismissed a portion of the EEOC's claims and granted summary judgment in favor of the Growers. The EEOC appealed this decision, and the Ninth Circuit reversed the dismissal and summary judgment orders and remanded for further proceedings. On remand, following additional discovery, the Growers again moved for summary judgment. The district court granted the Growers' summary judgment motion.

Issues on Appeal: The main issues on appeal are: (1) whether a reasonable jury could find the Growers liable for race and/or national origin discrimination because they imposed harsher terms and conditions of employment on Thai workers than on non-Thai workers, and (2) whether the Growers are also responsible as joint employers for Global's discrimination.

EEOC's Position on Appeal: The EEOC argued that Global had advised the Growers that it would obtain the farmworkers from Thailand because they would not complain about mistreatment in the workplace and would not be aware of their rights. The EEOC also claimed that Global allegedly promised the Thai farmworker significant monetary compensation, and the Thai workers took out substantial loans in order to pay recruitment fees based on these promises. The EEOC argued that upon arriving at the Growers' farms, however, the Thai workers were subjected to delayed and/or unpaid wages, poor working conditions, lack of access to food, unsafe transportation, and substandard housing. The EEOC also argued that the Thai farmworkers were also subjected to threats of deportation, derogatory language, and inequitable and unreasonable production quotas.

Court's Decision: The EEOC's unopposed Motion to Dismiss the Appeal was granted because the parties had reached a settlement.

EEOC v. Roark-Whitten Hospitality 2, LP	U.S. Court of Appeals for the Tenth Circuit No. 20-2023	5/27/2020 (appeal filed)	Title VII	Race National Origin Retaliation **Result:** Pending

Background: The EEOC sued the defendant hospitality company (RW2) alleging that it engaged in unlawful employment practices against employees at a hotel defendant owned. After learning that the defendant sold the hotel, the EEOC filed an amended complaint naming the successors (Jai and SGI) as defendants. After counsel for the defendant and successors withdrew, the court entered default judgment against the defendant and successor on all issues of liability and set a hearing to determine damages and injunctive relief. Notwithstanding the default judgment, the successors argued that dismissal of the complaint was warranted because the EEOC failed to plead that the successor had notice of the claims in a manner sufficient to hold the successors liable under a theory of a successor liability. The court dismissed the claims against the successors, holding that the operative complaint failed to state a plausible claim of successor liability because it did not plausibly allege that the successors had notice of the charges. The district court awarded a collective $35,000 in compensatory damages for the 11 claimants.

Issues on Appeal: Whether the district court erred in dismissing Jai and SGI from the case under Rule 12(b)(6) on notice grounds, given that there is no set formula to determine successor liability and, in any event, the EEOC's complaint pled constructive notice; Whether the district court abused its discretion in awarding only a collective $35,000 in compensatory damages for 11 aggrieved individuals who attested that RW2's discrimination and retaliatory terminations caused them anxiety, stress, and humiliation, and, for some, financial strain, vomiting, homelessness, headaches, depression, and suicidal thoughts.

EEOC's Position on Appeal: The district court erred in dismissing Jai and SGI for failure to state a claim of successor liability on notice grounds. It is well established that the successor liability doctrine applies under Title VII. The EEOC plausibly pled successor liability against Jai and SGI including, if required, that each had constructive notice. The district court's sole basis for dismissing the successor liability claims against Jai and SGI was the EEOC's purported failure to adequately plead notice. That dismissal constituted reversible error for three reasons: 1) the district court improperly applied a heightened pleading standard; 2) notice is not necessarily required for successor liability, an equitable doctrine; and 3) even if it were, the EEOC plausibly pled that Jai and SGI had constructive notice of the charges and claims, which satisfies the notice factor. Finally, the district court abused its discretion in awarding only $35,000 in compensatory damages for the 11 aggrieved individuals. That minimal award was so low as to constitute an abuse of discretion.

Court's Decision: Pending.

APPENDIX D – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2020[741]

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
1/7/2020	MI	USDC Eastern District of Michigan 2:20mc50020 Hon. David R. Grand	GCA Services Group Inc.	Individual Charging Parties	The EEOC withdrew its application for an order to show cause after the Respondent complied with the subpoena.
Commentary: The EEOC filed an application for an order to show cause why the subpoena should not be enforced stemming from an investigation of a charge of disability discrimination and race discrimination filed against Respondent under the ADA and Title VII. During its investigation, the Commission issued subpoena DT-19-08 to obtain documents and information relating to the investigation. Specifically, the subpoena asked the Respondent to: (1) Provide a copy of any and all documents which reflect the following regarding the Charging Party's discharge: (a) date of discharge; (b) reason for discharge; (c) statement of whether Charging Party had any right of appeal, and whether the Charging Party made any use of any appeal rights; (d) person recommending the discharge, including name, race, and position held. (2) Provide a copy of the Charging Party's employee personnel file. (3) Provide a copy of the Charging Party's medical file, to include all requests for reasonable accommodation[s] if applicable. (4) Provide a copy of all complaints, including emails made by the Charging Party and all other employees that worked for the same managers as the Charging Party, including a copy of all hotline complaints. For each complaint, provide a copy of the complete investigation into each complaint and any resolution, discipline, discharge and training as a result of the complaint. (5) Provide a copy of the Respondent's discipline, discharge and complaint guidelines/procedures in effect at the time of the Charging Party's discharge. (6) List the name, race, and date of hire of all custodians that worked on the same shift as the Charging Party from January 1, 2016 to the present. For each employee identified, please provide the last known address and telephone number. (7) List the name, race, and position title of all managers and supervisors that managed the Charging Party's work shifts. The EEOC claimed the Respondent failed to comply with the subpoena, and that this failure has delayed the Commission's investigation of the charge. On January 14, 2020, the court issued an Order to Show Cause why the subpoena should not be enforced. Shortly thereafter, the Respondent voluntarily complied with the subpoena, and the EEOC withdrew its application on January 27, 2020.					
5/28/2020	MI	USDC Western District of Michigan 1:20mc39 Hon. Phillip J. Green	Bloomin' Brands Inc. d/b/a Outback Steakhouse	Individual Charging Parties	The EEOC withdrew its application for an order to show cause after the Respondent complied with the subpoenas.
Commentary: The EEOC filed an application for an order to show cause why three administrative subpoenas should not be enforced. The EEOC is investigating three charges of sex-based wage discrimination filed by female employees against their employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. During the course of the investigation, the EEOC issued three substantively identical subpoenas seeking from Respondent documents and related information relevant to the investigation of the alleged wage disparities. Specifically, the subpoenas sought from the Respondent an electronic database with wage data from January 1, 2017 on four individuals (three women, one man), including but not limited to: (a) each position worked (*i.e.*, server, front of house, food runner, etc.); (b) the wage for each position worked including but not limited to; (c) starting wage; (d) date(s) of wage increase and subsequent wage, if applicable; (e) decision-maker's name and title responsible for setting wage or giving wage increase; (f) explanation why the male employee receives a higher wage than the female employees for every applicable position; (g) date of separation from the company, if applicable; (h) last known phone number; (i) last known personal email address; (j) last known address. The subpoena also sought their schedules. The Respondent provided the following response to these subpoenas, which the EEOC deemed insufficient: Response [to 1]: Reynolds's, Puelo's [sic], Nichols's, and Spinner's Off Premise Coordinator ("OPC") Time and Attendance Records1 are attached. Reynolds, Puleo, and Nichols earned $12.00 per hour for OPC shifts. Because Spinner was the only OPC with previous food delivery experience, he was the [lead] OPC and earned $13.00 per hour. As the lead OPC, Spinner was also responsible for helping with the launch of the off-premise program, marketing, training future OPC's, and managing the take-away room. Reynolds, Nichols, and Puelo [sic] were not responsible for those additional duties. Response [to 2]: Please see Response to Request [for Information] No. 2. The EEOC withdrew its application on July 15, 2020, after the Respondent voluntarily complied with the subpoenas.					

741 The summaries contained in Appendix D review select administrative subpoena enforcement actions filed by the EEOC in FY 2020. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
6/22/2020	NJ	USDC for the District of New Jersey 2:20-cv-07647 Hon. Edward S. Kiel	Hiossen, Inc.	Systemic Investigation	Pending

Commentary:

Pursuant to a directed investigation under the ADEA, the EEOC began investigating the Respondent's compliance with the age discrimination statute. The EEOC informed Respondent that the initial scope of the investigation would encompass hiring practices during the period January 1, 2016, to present (and on-going) at all of its facilities and operations in the United States and its territories and possessions under any brand or trade name, including, but not limited to, examining Respondent's policies and practices regarding recruitment, hiring, placement, compensation, discharge, and other terms and conditions of employment with respect to individuals age 40 and over.

Concurrently with the Notice, the EEOC issued a Request for Information (RFI) asking that Respondent provide the following information and compilations of data or documents dating from January 1, 2016, to the present to the Commission by April 8, 2020, concerning: (1) Respondent's legal name and address, business in which it is engaged, number of persons employed by location, and its legal status, state of incorporation, and place of business; (2) Respondent's organizational structure; (3) the identification by name of facility and complete address of all Respondent's facilities in the U.S. together with information on beginning and ending dates of operation organized in an Excel file; (4) a description of all recruitment activities, methods, or practices used at any time since January 1, 2016, with a description of the records that Respondent maintains reflecting such activities and the identity of all persons with knowledge of the facts set forth in the response; (5) identification of people involved in the hiring, recruitment, or screening of any person for an employment opportunity with Respondent, including where each person works/has worked and a description of the person's role in the process; (6) all applicants to Respondent's facilities, including full name, contact information, identifying information (Social Security number, employee ID, applicant ID), date of birth, date applied, position applied for, whether an offer was made, whether an offer was accepted, reason for not making an offer, date of hire, job title/s, rate of pay at hire, current rate of pay, and date of separation all organized in an Excel file; (7) employees and workers at Respondent's facilities, including full name, contact information, identifying information (Social Security number, employee ID), date of birth, date of hire, job title/s, rate of pay at hire, job status changes, current rate of pay, and date of separation all organized in an Excel file; (8) all application materials provided to Respondent or obtained by Respondent concerning any person seeking or being considered for an employment opportunity with Respondent; (9) Respondent's recruitment and hiring policies, procedures, and selection criteria; (10) materials related to advertising or posting of job vacancies or solicitation of job applicants; (11) materials related to Respondent's employment discrimination policies, practices, or procedures; (12) materials referring, reflecting, or relating to any compensation paid to any worker or employee; (13) materials referring, reflecting, or relating to any benefits provided to any worker or employee; (14) materials referring or relating to any training Respondent conducted on the ADEA for the benefit of its employees, supervisors, or managers, including training materials, attendance lists, and dates of training; (15) complaints, reports, inquiries, or allegations of age discrimination known to Respondent; (16) materials reflecting, referring, or relating to Respondent's document or data retention policies, practices, and procedures; and (17) materials that explain any content of any of the documents (including data) produced by Respondent in response to the RFI. EEOC noted if the Respondent refused, it would issue a subpoena seeking the same.

When respondent failed to supply the information requested in the RFI, on May 12, 2020, the EEOC issued and served upon Respondent Subpoena No. PA-20-02 for the same information requested in the RFI. Respond moved to quash the subpoena, and EEOC moved to dismiss the motion, as well as the present subpoena enforcement action.

On August 24, the magistrate issued an order noting that the EEOC must demonstrate the subpoena meets the threshold requirements for enforcement: (1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry. The magistrate noted the Respondent does not contest the EEOC's authority, and that the demand is not too indefinite, and the information sought is reasonably relevant to the authorized inquiry. Nor did the Respondent demonstrate the EEOC is acting in bad faith. The court could not, however, make a determination that compliance would be unduly burdensome, and noted the parties had been engaging in good-faith discussions to narrow the subpoena's scope. To that end, the magistrate ordered the Respondent designate a person with knowledge over the company's electronically stored information, and that the parties meet and confer by September 4, 2020 regarding the format and scope of production.

On September 4, the Respondent filed objections to the magistrate's findings, conclusions, and recommendation, and asked the court to reject the recommendations and quash the EEOC's subpoena. The Respondent claimed the magistrate ignored binding precedent requiring the EEOC to describe, with specificity, the scope of its investigation under the ADEA; primarily relied upon a single charge filed by a claimant whose allegations span a roughly six-month period in 2013, years before the arbitrary period under investigation, which, in turn, is well before the governing statute of limitations, in finding the subpoena was not overbroad; overlooked that the subpoena is unduly burdensome on its face; and erred by not properly considering persuasive evidence that the EEOC commenced this investigation to harass the Respondent. A telephone conference is set for March 23, 2021.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
7/9/2020	OH	USDC for the Southern District of Ohio, Western Division at Cincinnati No. 1:20-mc-16 Hon.	Flipdaddy's, LLC	Individual Charging Party	The EEOC moved to dismiss its application for an order to show cause after the Respondent complied with the subpoena.

Commentary:

EEOC filed an application for an entry of an order to show cause why its administrative subpoena issued on June 5, 2020 should not be enforced against Respondent. This is an action for enforcement of a subpoena issued pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 as amended. The charge alleges that Respondent violated the ADA by terminating Charging Party from his position as a dishwasher/cook because of his disability and in retaliation for complaining about disability discrimination.

The EEOC issued a Request for Information, but alleged the Respondent did not comply. Therefore, the EEOC issued a subpoena requiring Respondent to produce (1) A copy of Charging Party's personnel file, including, but not limited to, all documents containing employment information regarding his job application(s), job performance, evaluations, discipline, and discharge, etc.; (2) A copy of Charging Party's complete medical file; (3) Copies of written records, including but not limited to statements, notes, e-mail correspondence, text messages, interviews notes, discussion notes, investigative notes, reports, customer reports, and/or memoranda relating to any disability-related complaint made to any Respondent representative; (4) In an electronically searchable format, a list of employees who worked at Respondent's facility at issuing, including: a. Name; b. Disability status, if known; c. Position title; d. Hire date; e. Date left, if applicable; f. Reason for leaving, if applicable; For non-management employees: g. Home address; h. Telephone number(s); i. Email address(es); (5) A copy of Respondent's anti-discrimination policy; (6) A copy of Respondent's harassment policy; (7) An explanation as to why Respondent terminated Charging Party; and (8) The name of the individual(s) who performed dish washing duties after December 20, 2020.

The Respondent did not file a Petition to Revoke or Modify the Subpoena, did not comply with it as of the date the EEOC filed its application for an order to show cause.

On September 25, 2020, the EEOC filed a notice of compliance and motion to dismiss its application, explaining that the Respondent produced all information sought.

Appendix E – FY 2020 Select Summary Judgment Decisions by Claim Type(s)

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate	Austal USA, LLC	U.S. District Court for the Southern District of Alabama No. 1800416-CG-N	2020 U.S. Dist. LEXIS 48551 (S.D. Ala. Mar. 20, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-Employer The court granted the employer's motion for summary judgment.	Did the defendant fail to accommodate the charging party for his diabetes-related absences when it discharged him for accruing too many unexcused absences under its attendance policy?

Commentary:

The charging party employee began working for the company in 2007 in a logistics position. The position required him to inspect inventory and deliver materials – all work necessitating physical presence at the facility. The employee was diagnosed with diabetes, and his condition caused him to miss work on an unpredictable and intermittent basis.

Under the company's attendance policy, employees who had eight "occurrences" in a rolling 12-month period were terminated from employment. The policy also contained a progressive discipline system: a verbal warning (four occurrences), written warning (six occurrences), and final warning (seven occurrences). The policy also provided that an employee could use up to five doctors' notes to excuse absences due to personal illness, and those absences would not count as occurrences under the policy. The company also did not count absences covered under the Family and Medical Leave Act (FMLA).

The employee's job ended after he had exhausted FMLA leave and paid time off (pursuant to company policy), and then exceeded the number of absences he was allotted under the attendance policy. The EEOC sued on the former employee's behalf, and the company moved for summary judgment. In that motion, the company argued that the employee was no longer a qualified individual with a disability because he could not perform the essential job function of attending work regularly. It was undisputed that the employee had to be at work to perform his job; the court therefore agreed that attendance was an essential function of the position.

In response, the EEOC contended that the company should have provided additional medical leave to the employee as a reasonable accommodation. The court rejected this argument, explaining that additional leave would not resolve the issue. The employee's absences were unpredictable in nature, and he could not follow any work schedule on a regular basis. For that reason, modifying his hours or reducing them would not be effective in allowing him to perform the essential functions of the job. In addition, the employee's unpredictable absences were likely to be permanent. If he had been capable of returning to work on a regular basis after a definite amount of time, a different result may have occurred. Accordingly, the court granted summary judgment for the employer. The "absence" of a compelling argument in favor of accommodating this employee's unreliability doomed the EEOC's case.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination	Cracker Barrel Old Country Store, Inc.	U.S. District Court for the District of Maryland No. No. 8:18-cv-02674-PX	2020 U.S. Dist. LEXIS 7528 (D. Md. Jan. 16, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Did the defendant discriminate against the charging party by failing to consider him for a job because he is deaf?

Commentary:

The EEOC filed a lawsuit against the defendant restaurant for failing to consider a job applicant because he is deaf.

The individual applied to the open dishwasher position, and was contacted to schedule an interview. The charging party used a videophone service to schedule the interview, putting the defendant on notice that he was deaf. When the charging party arrived for the interview, he was kept waiting and eventually told the manager conducting the interview was not there. Despite repeated attempts, the interview was never rescheduled. The defendant's internal records indicate the charging party was removed from consideration for the job. The electronic records state: "not going to hire; reject. Do not hire. Incomplete data."

The EEOC filed suit under the ADA, and was able to make out its prima facie case of discrimination: the charging party has a disability, he applied for an open position, his prior experience indicates he was qualified for the position, and his disability was a motivating factor for his rejection.

The defendant first claimed that it did not refuse to hire the charging party, but merely "delayed" its consideration of hiring. A mere delay in hiring or promotion does not constitute an adverse employment action. *See, e.g., West v. New Mexico Taxation & Revenue Dep't*, 757 F. Supp. 2d 1065, 1098 (D.N.M. 2010) ("Mere delay, without more, is not enough to establish an adverse employment action"); *MohanKumar v. Kansas State Univ., 60 F. Supp. 2d 1153, 1162 (D. Kan. 1999), aff'd*, 221 F.3d 1352 (10th Cir. 2000) (holding that a department head's opposition to hiring of plaintiff, which allegedly resulted in a three-month delay, did not constitute an adverse employment action); *Crosby v. Sunoco, Inc.*, No. MO:16-CV-00142-RAJ, 2018 WL 1602961, at *10 (W.D. Tex. Jan. 4, 2018) (holding that "merely intermediate decisions or temporary delays leading to [defendant's] ultimate decision to hire plaintiff do not constitute actionable adverse employment actions."). In this case, however, the court determined that the defendant did not merely delay consideration, but took him out of the running entirely.

The defendant next contended there is no evidence that the charging party's disability played a role in his non-selection. The court, however, again disagreed, finding that before the defendant knew of the candidate's hearing impairment, it offered him a chance to interview, thus acknowledging his qualifications for the job. Communication ceased once it became evident the charging party was deaf. That the charging party's experience deviated so significantly from the defendant's "routinized procedure for selecting its employees contributes as well to a genuine dispute as to whether its odd treatment of [charging party] amounted to pretext," the court explained. Such a "constellation of facts" can lead a reasonable juror to find the charging party was denied employment because of his impairment.

Because genuine issues of material fact exist as to the fourth element of the prima facie case, the court denied summary judgment on this ground.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination Failure to Accommodate	PML Services LLC	U.S. District Court for the Western District of Wisconsin No. 18-cv-805-bbc	2020 U.S. Dist. LEXIS 115578 (W.D. Wis. July 1, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion on the grounds genuine disputes of material fact remain regarding the EEOC's *prima facie* case for disability discrimination.	Did the EEOC fail to show that the charging party—a housekeeper who was fired for absenteeism following a seizure—is disabled, that the defendant knew she was disabled, that she could perform the essential functions of her position, and that her employment was terminated on account of her disability or because the employer refused to accommodate her?

Commentary:

The EEOC brought suit on behalf of a housekeeper for defendant hotel. The EEOC alleged the charging party has a seizure disorder and is therefore disabled, and that the employer refused to accommodate her disability by allowing her to take a couple of days off following a seizure.

The charging party contends that when she suffers a seizure, she experiences limitations in concentration and physical movement, as well as mental fogginess, difficulty reading and understanding words, shaking, fatigue, stiffness, clumsiness and pain, symptoms that typically resolve in 2-5 days. Her doctor advised her to rest during the recovery period.

The defendant's handbook has a return-to-work policy stating employees may be required to provide their supervisor with a doctor's note following an absence. In all cases where the absence due to illness or temporary disability is for three or more consecutive workdays, the employee is required to provide a return-to-work release from the doctor. The employer's leave of absence toolkit includes guidelines for managers to follow.

During the charging party's 90-day probationary period, she alleges she suffered a seizure at home. She was not scheduled to work the following day, but asked her supervisor if she could take two days off after that period, time off which was reportedly granted. She did drive to work the next day to pick up her paycheck. The parties dispute whether the charging party was told to provide a doctor's note.

The charging party's employment was terminated for excessive absenteeism. During the meeting, the supervisor avoided discussion of her seizure disorder, emphasizing she was being fired for absenteeism, but noted that she performed good work. The charging party referenced her doctor's recommendations, but the supervisor did not ask to look at any materials provided.

The EEOC brought suit. To succeed on a disparate treatment claim under the ADA, the EEOC must show the charging party (1) is disabled; (2) is a qualified individual, meaning she is able to perform the essential functions of the job either with or without reasonable accommodation; and (3) suffered an adverse employment action because of her disability. To succeed on a failure-to-accommodate claim, plaintiff must show that the charging party (1) is a qualified individual with a disability; (2) defendant was aware of her disability; and (3) defendant failed to reasonably accommodate that disability.

Defendant moved for summary judgment, arguing the EEOC failed to show the charging party is disabled, that the defendant knew she was disabled, that she could perform the essential functions of her position, and that her employment was terminated on account of her disability or because the employer refused to accommodate her. The court disagreed, finding a reasonable jury could make those assessments using the facts presented.

For example, during the termination meeting, the supervisor expressed "grave concerns" about the charging party's "ability for attendance," and accused the charging party of failing to "disclose" her seizure disorder before she was hired, evidence that she was fired because of her disability. Therefore, there are genuine disputes of material fact about the reason that defendant terminated the charging party's employment. Moreover, the defendant presented little evidence the time off requested would have placed an undue burden on the business.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination	Steel Painters LLC	U.S. District Court for the Eastern District of Texas No. 1:18-CV-303	2020 U.S. Dist. LEXIS 18716 (E.D. Tex. Jan. 14, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment, and granted the EEOC's motion for leave to file a response.	Does a triable issue of fact exist as to whether the charging party, who takes methadone, is a qualified individual with a disability? Was the charging party's employment terminated for a legitimate, nondiscriminatory reason (failure to provide verification form to work in safety-sensitive position) or was this reason pretext for discrimination?

Commentary:

The EEOC sued a painting company for unlawfully firing a worker because he took methadone as part of his recovery for opioid addiction. The EEOC claimed the company regarded the charging party as disabled and that he had a record of being disabled.

The defendant hired the charging party as a journeyman painter. The charging party took prescribed methadone at night after work as part of his treatment program for opioid addiction. When hired, he had been employed in a similar position at another company. On his first day of work, he took a pre-employment drug and alcohol test, and worked through the rest of the week. He disclosed to the employer his methadone treatment on his medical form. The following week, the methadone caused his drug test to come pack "positive." After he provided the laboratory with a copy of his prescription and other documentation about his treatment, the laboratory cleared him to work.

The defendant, however, required that the charging party have his physician sign a form (SOP-57) that it introduced that year for safety-sensitive positions. However, the defendant had not required any other employee to submit this form until the day it asked the charging party to fill it out. The charging party's doctor would not sign this form for privacy reasons, but provided other information verifying the prescription and invited the defendant to contact him for more information. The defendant did not accept this offer. An administrative manager also admitted it "[did not] normally hire people on methadone," and terminated the charging party's employment for failure to submit the required form.

To establish a *prima facie* case of employment discrimination under Title I of the ADA, the plaintiff must show that: (1) he has a "disability" or was regarded as disabled; (2) he was qualified for the position; and (3) he was subject to an adverse employment action because of his disability. The ADA defines a disability as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

The defendant first denied the charging party was disabled. Addiction or perception of addiction is a disability if it substantially limits, or is perceived by his employer as substantially limiting, the ability to perform a major life function." *Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 860 (5th Cir. 1999). Furthermore, "[i]ndividuals who take medication or use corrective devices to lessen an impairment but still remain substantially limited as to one or more major life activities are still disabled under the ADA." *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 620 (5th Cir. 2009); *see MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 339 (6th Cir. 2002) (holding the fact that methadone treatment ameliorated drug addiction as it was meant to did not deprive recovering drug addicts of the ADA's protection).

In this case, the court agreed that the EEOC had set forth enough evidence to show a triable issue of fact as to whether the charging party was disabled or had a record of a disability. The charging party asserted that when he was using opioids, he lost his social skills, was extremely aggressive, easily agitated, short-tempered, and volatile. He further contends that when he was using, his addiction prevented him from sleeping or eating. When he attempted to stop using, he would become extremely sick from withdrawal and experience severe nausea, fever, and stomach pain. His withdrawal symptoms caused his body to ache all over, rendering him unable to work, eat, drink, focus, or sleep. The charging party admits that his use of methadone has ameliorated the effects of his addiction.

The EEOC was also able to demonstrate there existed a triable issue as to whether the charging party's failure to submit the verification form deemed him unqualified to perform his safety sensitive position. Notably, it is undisputed he had the necessary prerequisites to perform the job, and worked even when the employer had constructive knowledge of his methadone prescription. Moreover, he had never been disciplined or discharged from any workplace because of a methadone-related accident. A reasonable jury, therefore, could conclude that not only was he qualified, but also would not pose a risk to the health and safety of others by working as an industrial painter while taking prescription methadone. By regulation, "[t]he determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."

Moreover, there was evidence of bias and pretext. The administrative manager noted they did not normally hire people on methadone, and acknowledged in an email that the drug was used to treat a disability covered by the ADA. Specifically, with respect to a separate prospective hire who had been prescribed methadone, the manager wrote: "[Attorney] called and if we moved people around and do not need the new hire anymore, we need to document that and stick with that and not worry about trying to follow thru [sic] with getting valid prescription for methadone signed by physician and not the director of the clinic and then sending him to Dr. Craig for evaluation of whether methadone impairs his ability to work in safety sensitive position."

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
These statements could lead a jury to infer the manager's negative views of recovering drug addicts who used methadone, and that she was sufficiently familiar with federal employment law to discriminate without leading to repercussions. A reasonable jury could interpret these statements as evidence of discriminatory animus as opposed to a true safety concern regarding his specific job duties. In addition, the company's reliance on a policy it only chose to enforce for the first time against the charging party undercuts the employer's legitimate, nondiscriminatory reason for termination. Taken altogether, these actions could lead a reasonable jury to conclude the charging party's job was terminated because of his disability.					
ADA Disability Discrimination	T&T Subsea, LLC	U.S. District Court for the Eastern District of Louisiana No. 19-12874	2020 U.S. Dist. LEXIS 75371 (E.D. La. Apr. 29, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment.	Did the employer show that the charging party's cancer diagnosis and treatment posed a direct threat in the workplace, therefore rendering him unqualified to perform the essential job duties, and that precluding the charging party from returning to work post-surgery and treatment was in line with safety standards and policy, and therefore a business justification for the employee's job termination?

Commentary:

EEOC sued a company on behalf of a former employee who was diagnosed with cancer while employed as a diver/tender. While undergoing chemotherapy, the charging party was placed in a non-diving position, and then put on FMLA leave. After chemotherapy and surgery was completed, the charging party informed the employer he sought to return and would be cleared to return to work by his doctor. Instead, the employer terminated his employment on the grounds the Association of Diving Contractors International (ADCI) guidelines and the company's handbook precluded him from passing the dive physical, and therefore he was no longer qualified to perform the job's essential functions.

About a month later, the charging party's doctor cleared him to return to work, and he resumed employment as a diver at a different employer.

After the EEOC filed suit under the ADA, the company filed a motion for summary judgment, arguing it did not discriminate against the charging party because of his disability, but rather because his cancer and subsequent treatment disqualified him from diving for five years under the ADCI consensus standards, and therefore he was not qualified.

The EEOC, in turn, argued that summary judgment is not warranted because the ADA, not the ADCI guidelines, govern. Moreover, the defendant's admission it fired the charging party because of cancer constitutes direct evidence of discrimination, so the McDonnell Douglas burden-shifting framework does not apply and the EEOC does not have to prove pretext. Instead, the jury need only determine whether the defendant can prevail on its affirmative defenses: (1) that the charging party was a direct threat under the terms of the ADA, and (2) the qualification standard the defendant invokes (the ADCI consensus standards) is job-related and consistent with business necessity.

In this case, the evidence before the court on record showed that there are genuine issues of material fact regarding whether defendant meaningfully assessed the charging party's ability to perform his job safely based on the best available objective evidence and reasonably concluded that he posed a direct threat. Considering the evidence before the court that the company relied on the advice of a physician who did not examine the charging party or his medical records before firing him, the court found that a reasonable jury could find that the defendant did not make an individualized assessment of the charging party's ability to perform safely the essential functions of the job. Moreover, the fact that the charging party found employment as a diver following his termination from defendant's employment raises a material issue of fact regarding any direct threat he allegedly posed.

Next, with respect to the defendant's business necessity argument, the court explained that once an employee shows that a qualification standard tends to screen out an individual with a disability, the employer shoulders the burden of proving that the challenged standard is job-related and consistent with business necessity. In this case, defendant points to the ADCI consensus standards and its diver's handbook as the qualifications standards upon which it relied as a business necessity to bar anyone who has had cancer or cancer treatments (chemotherapy, radiation, and surgery) from being a diver for five years after the occurrence.

The court determined, however, that the defendant had not demonstrated conclusively, without factual dispute, that the ADCI and handbook standards are uniformly applied, job-related, and consistent with its business necessity, or that there was not some reasonable accommodation available. Thus, the defendant is not entitled to summary judgment on its business-necessity defense.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination	UPS Ground Freight	U.S. District Court for the District of Kansas No. 17-2453-JAR	2020 U.S. Dist. LEXIS 35115 (D. Kan. Mar. 2, 2020)	Parties' Cross-Motions for Summary Judgment **Result:** Mixed The court denied both parties' motions.	Did an employee who had a stroke and was denied an alternative full-time position under his CBA during the one-year DOT-recommended waiting period have a record of impairment or was regarded as having a disability under the ADA? Did the employer discriminate against the driver by denying him a full-time position it allowed drivers whose driver's licenses/privileges were suspended for DUI reasons but not for other medical reasons?

Commentary:

The EEOC claimed the defendant discriminated against the charging party in violation of the ADA. The charging party was a commercial truck driver who had a stroke. This position required a commercial driver's license (CDL) and a valid medical examiner's certificate (MEC). The U.S. Department of Transportation regulations require interstate drivers to submit to periodic medical examinations to obtain a MEC. DOT guidance recommends a one-year waiting period after a stroke for commercial drivers because of the heightened risk for recurrence.

Following his stroke the driver returned to work in the same road driver position in February 2013. A couple of months after returning to work, the driver underwent his periodic driver's medical examination. Although he was told he passed the examination, he was not reissued a MEC because he disclosed his stroke. He was initially told he could work in an alternative position on the docks.

Under the collective bargaining agreement applicable to the worksite, when employees have their driving or operating privileges revoked or license suspended, they are granted a leave of absence without loss of seniority not to exceed one year, and are given available work opportunities. The driver was told in May, however, that this provision applied only to those who were unable to work because of a DUI, not to those who lost their license or privileges due to a medical condition. In May he was ultimately offered a part-time position instead. In December he was able to obtain a valid MEC and was put back to work.

The outstanding claim in this case was the disability discrimination claim under the ADAAA relating to how the CBA was applied to the driver following his stroke. The EEOC claimed the employer had an express policy of treating disabled drivers differently than drivers who received DUIs. The defendant, however, claimed the different treatment was a result of his lack of a MEC, not on account of a disability.

Because the EEOC's claim in this case is based on discriminatory classification, the *McDonnell Douglas* burden-shifting framework is inapplicable. Instead, the EEOC must show that at the time of the adverse employment action, (1) the driver was disabled as defined under the ADAAA; (2) he was qualified, with or without reasonable accommodation by the employer, to perform the essential functions of the job; and (3) he was discriminated against because of his disability.

The court first rejected the defendant's claim that the EEOC did not properly move for summary judgment on the disability element of its discrimination. Per the court, "the EEOC was not required to copy and paste its entire response brief into its own summary judgment brief in order to properly preserve its moving arguments on these issues, and [defendant]'s cited authority does not support disallowing the EEOC's cross-reference in this case." The court therefore proceeded to consider both parties' submissions regarding the disability element.

Under the ADAAA, "[t]he term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment." The 2008 amendments to the ADA make establishing a disability easier for plaintiffs and were intended to ensure that "the definition of disability . . . [is] to be construed in favor of broad coverage."

In this case, the EEOC abandoned its claim that the charging party was actually disabled at the time of the alleged adverse employment actions. Instead, the EEOC claims he had either a record of a disability or that defendant regarded him as disabled. A record of disability may be satisfied by a showing that the plaintiff had a disability in the past (even though he no longer suffered from that disability when the allegedly discriminatory action took place). The court noted this provision is to be construed broadly and the inquiry "should not demand extensive analysis."

The court explained that no reasonable jury could conclude the driver was not impaired following his stroke, and that such impairment included a heightened risk of future strokes. In addition, the DOT's one-year waiting period indicates strokes are physical conditions that predispose a period to additional strokes. Therefore, the EEOC demonstrated that the charging party's physiological condition, rather than a physical, psychological, environmental, cultural, or economic characteristic caused the increased risk of stroke recurrence. The EEOC was also able to provide medical evidence to allow a jury to decide whether this condition did substantially limit the charging party's ability to perform life functions (eat, self-care, working, etc.). The court noted, however, that the evidence fell short of the EEOC's heavy burden of demonstrating as a matter of law that the charging party's stroke substantially limited his major life activities during the time he worked on the dock part-time. Thus, both parties' motions were denied as to whether the charging party had a record of a disability during the applicable time period.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
With respect to the "regarded as disabled" element, the EEOC must show the charging party (1) has an actual or perceived impairment, (2) the impairment is neither transitory nor minor, and (3) the employer was aware of and therefore perceived the impairment at the time of the alleged discriminatory action. In this case, the EEOC showed the charging party had an actual or perceived impairment immediately following his stroke, the condition was not transitory or minor as shown by the DOT's medical guidance, and that the employer was aware of his condition. The EEOC also showed that the charging party was a qualified individual, as he was able to perform the same job until it was discovered he no longer had a valid MEC, and was able to work on the dock. There was also no dispute the charging party was denied a full-time dock position because of his lack of MEC for medical reasons, not because of a DUI. Therefore, a reasonable jury could conclude the driving restriction was part of the impairment, and that he had a record of perceived impairment that formed the basis of the employer's actions to prevent him from working full-time. In sum, the EEOC was able to show the charging party's stroke was an impairment, but it remained a question for the jury to determine whether this impairment substantially limited his major life activities such that on the dates the employer made employment decisions adverse to the driver, he had a record of impairment.					
ADA Disability Discrimination	UPS Ground Freight	U.S. District Court for the District of Kansas No. 17-2453-JAR	2020 U.S. Dist. LEXIS 73238 (D. Kan. Apr. 27, 2020)	EEOC's Motion for Reconsideration of Court's Denial of Summary Judgment **Result:** Pro-Employer The court denied the EEOC's motion for reconsideration.	Should the court grant the EEOC's motion for reconsideration of the denial of summary judgment?
Commentary: The EEOC claimed the defendant discriminated against the charging party in violation of the ADA. EEOC claimed the charging party had either a record of a disability or that defendant regarded him as disabled. The court denied the EEOC's motion for summary judgment, noting that the evidence fell short of the EEOC's heavy burden of demonstrating as a matter of law that the charging party's stroke substantially limited his major life activities during the time he worked on the dock part-time. Thus, both parties' motions were denied as to whether the charging party had a record of a disability during the applicable time period. The EEOC filed a motion to reconsider, arguing the court misapplied the law or facts in three ways: (1) by declining to rule that the charging party had a record of disability as a matter of law because his January 2013 stroke substantially limited the operation of his cardiovascular and neurological systems; (2) by declining to rule that he was disabled under the "regarded-as" definition of disability because there are disputed material facts about the defendant's awareness of his impairment on the relevant dates; and (3) by misstating the uncontroverted facts relevant to the causation analysis. The court explained that while a reasonable jury could conclude that the stroke substantially limited the charging party's major bodily functions when considering the evidence, it could also find that it did not. As such, summary judgment was not appropriate on the basis that the charging party had a record of disability. With respect to the regarded-as argument, the EEOC took issue with the court's determination that the EEOC did not allege facts sufficient to demonstrate the employer perceived the employee had an existing impairment at the time it terminated the charging party's employment. The EEOC's interpretation of the ADAAA is that it allows a plaintiff to establish a regarded-as disability where the employer is aware of either a current or a past impairment. The court disagreed. The ADAAA's regarded-as disability definition applies to an individual "regarded as having such an impairment." The Eleventh Circuit explained in *EEOC v. STME, LLC*, No. 18-11121 (11th Cir. Sept. 12, 2019), that "[i]n 'regarded as' cases, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action." The court stated that the regarded-as definition "necessarily refers back to § 12102(1)(A)," the definition of actual disability. The court did not discuss or reference subsection (B), the record-of-disability definition. Recent circuit cases have held that a regarded-as disability requires the employer to perceive the employee as "having a current existing impairment at the time of the alleged discrimination." The fact that charging party was released to work and worked for two months with no perceived limitations is relevant to the timing of defendant's awareness. With respect to the causation argument, the court found there remains a genuine issue of material fact about whether the charging party's treatment under the CBA was based on disability and the court declined the EEOC's invitation to find that the defendant's interpretation of the CBA, standing alone, evidences causation as a matter of law.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADEA Age Discrimination	RockAuto, LLC	U.S. District Court for the Western District of Wisconsin No. 18-cv-797-jdp	2020 U.S. Dist. LEXIS 54675 (W.D. Wis. Mar. 30, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Did the EEOC set forth sufficient evidence to rebut defendant's motion for summary judgment in an ADEA failure-to-hire case?

Commentary:

The EEOC alleged an internet-based auto parts seller violated the ADEA when it failed to hire the charging party, who was 64 at the time, as a supply chain manager. The defendant had asked applicants to disclose their college graduation years. As part of the applicant screening process, once the applicant passed the education requirements, they were scored on a variety of factors. If they received sufficient points from that process, they would move to the next step. Exceptions to this score threshold were made based on a discretionary basis.

The applicant failed to receive sufficient points to move to the next level, and did not receive any discretionary passes. He was ultimately not hired, although he had 15 years of relevant experience and an MBA. The defendant instead hired younger candidates.

EEOC contends that a jury could reasonably conclude that the defendant engaged in age discrimination based on evidence of four related propositions: (1) the charging party was more qualified than younger candidates who advanced further in the defendant's hiring process; (2) the hiring system was biased against older applicants, using applicants' graduation dates as a proxy for their ages and overvaluing academic accomplishments in comparison to job experience; (3) the defendant scored the charging party's application less favorably than similarly situated, younger applicants; and (4) defendant failed to give the charging party a discretionary pass to advance in the process but gave them to similarly situated, younger applicants.

The court found the EEOC presented objective evidence in the form of comparators—other individuals who received preferential job treatment despite having equal or lesser qualifications than the plaintiff or claimant. Summary judgment was therefore denied.

EPA Equal Pay	Enoch Pratt Free Library	U.S. District Court for the District of Maryland No. SAG-17-2860	2019 U.S. Dist. LEXIS 187970 (D. Md. Oct. 30, 2019)	Parties' Cross Motions for Summary Judgment **Result:** Mixed The court denied both parties' motions for summary judgment.	Did the EEOC show that the female librarians' job duties were sufficiently similar to that of a male colleague's to justify an FLSA and EPA claim? Did the defendant show that its reason for paying a man more was based on legitimate, nondiscriminatory reasons?

Commentary:

The EEOC alleged a library violated the Fair Labor Standards Act and the Equal Pay Act by paying a man more money than it paid to women. The charging party brought the pay discrimination charge after having worked for the library for 20 years. She claimed she and fellow female librarians were paid less than a male librarian hired to fill a supervisory position for which he had less experience. Both parties filed motions for summary judgment.

The EEOC claimed in its motion that the women performed the same type of work as the male employee, but made $56,500 to $63,900, compared to the male employee's $68,900 salary. The EEOC also alleged that the defendant could not show that the man was hired because of his experience or that the pay differential was based on non-discriminatory factors such as job performance.

By contrast, in its motion for summary judgment, the library countered the EEOC had not provided sufficient information about the job responsibilities involved to assert that the parties were paid differently for performing the same job, or that gender was the cause of the higher salary.

The court denied both parties' motions. The court determined that the EEOC could not show that all librarian supervisors shared similar core duties. "Overall, the branches generally have varying responsibilities in light of their different physical plants, different clientele, and different community resources . . . A factfinder should therefore assess whether the duties performed by [the library supervisors] are sufficiently similar to establish a *prima facie* case of unequal pay for equal work."

Nor could the defendant show that the higher salary for the male employee was justified and not in violation of the FLSA or EPA. The court explained, "A rational jury could find that the ultimate pay discrepancy was due, at least in part, to gender . . . A jury could find that the reasons proffered by defendants were not, in fact, the reasons for the disparity in [the male employee's] pay upon his return."

Following a five-day bench trial, the court ultimately found the pay disparity was not justified by a factor other than sex. The court held that the defendants violated the EPA and determined the five claimants were entitled to an award of stipulated back pay and liquidated damages. The liquidated damages award was equal to each claimant's back wage payment.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Joint Employment	Tender Loving Care Management Inc., d/b/a TLC Management	U.S. District Court for the Southern District of Indiana No. 3:17-cv-00147-RLY-MPB	2020 U.S. Dist. LEXIS 54675 (S.D. Ind. Mar. 31, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-Employer The court granted the defendant's motion.	Should the defendant's motion for summary judgment be granted because it is not a joint employer with the other defendants that allegedly engaged in class-wide race discrimination?

Commentary:

EEOC alleged defendants violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 by discriminating against Black employees ("Class Members"). The defendant in the instant case moved for summary judgment, arguing it cannot be liable under Title VII because it is not the Class Members' joint employer. The court agreed.

The Village at Hamilton Pointe is an Indiana limited liability company that operates a long-term care facility in Newburgh, Indiana. The Class Members at issue all work or have worked for Hamilton Pointe and were on its payroll.

Defendant TLC is an Indiana corporation with its principal office located in Marion, Indiana. TLC, like Hamilton Pointe, is owned and operated by Gary Ott, Ryan Ott, Dwight Ott, and Cullen Gibson. TLC provides management consulting and outsourcing solutions to client health care facilities like Hamilton Pointe. TLC's services include accounting, budgeting, information technology, state and federal regulatory compliance, and human resource services. Outsourcing solutions include information technology, payroll and benefit processing, policy forms and samples, and a hotline service. TLC's services are offered pursuant to contract at a predetermined rate, and provided to Hamilton Pointe on an independent contractor basis. TLC does not have the authority to hire, fire, or discipline any of the Class Members; does not manage or control the scheduling or assignment of Class Members; Class Members are not and never were on TLC's payroll.

To bring a Title VII claim against TLC, the EEOC must establish the existence of an employer-employee relationship between TLC and the Class Members. The EEOC contended that TLC had sufficient control over the Class Members to be considered their "joint employer." In the alternative, the EEOC contended that TLC forfeited its corporate status and was, therefore, a proper defendant.

In determining whether an entity is an indirect or joint employer, the Seventh Circuit employs a five-factor test: (1) the extent of the [purported] employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991).

In determining the existence of an employer-employee relationship, "the employer's right to control is the 'most important' consideration." *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 703 (7th Cir. 2015).

Based on the five-factor test set forth in *Knight*, the court found that the EEOC failed to raise a genuine issue of material fact on whether TLC is the Class Members' joint employer.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Race Discrimination Punitive Damages Vicarious Liability	Order Joe's Old Fashioned Bar-B-Que	U.S. District Court for the Western District of North Carolina No. 5:18-CV-00180-KDB-DSC	2020 U.S. Dist. LEXIS 103497 (W.D.N.C. June 12, 2020)	Defendant's Partial Motions for Summary Judgment **Result:** Pro-Employer The court granted the defendant's partial motions for summary judgment, and dismissed the EEOC's and charging party's claims for punitive damages, as well as the charging party's claims for battery and intentional infliction of emotional distress against the defendant.	Is the defendant liable under Title VII and state law for an employee's use of racial slurs and battery of a charging party, when the record shows only one incident was reported, and the co-worker's employment was immediately terminated? Can the defendant be liable for punitive damages for the hostile work environment claim?

Commentary:

The EEOC brought suit against the restaurant-defendant, alleging a co-worker created a hostile work environment based on race against the charging party, forcing her to quit. The charging party alleges the co-worker engaged in racially hostile acts at least 20 times, but admits to only reporting "maybe six" instances to management, and could only recount specifics of two. In one instance, the co-worker allegedly mumbled racist comments under his breath as he walked by the charging party. In another, the co-worker told a joke in which the punchline included racial slurs. The charging party left the job after an altercation with the co-worker, in which he allegedly put items in her ice cup, hit her with a pan, and used racial slurs.

The charging party complained, and the co-worker was fired. The charging party was asked to come back to work, but she declined. Four months later, the co-worker was rehired on a probationary basis.

The EEOC brought suit under Title VII for the charging party's constructive discharge, seeking punitive damages. The charging party brought suit in intervention alleging state law claims for the intentional torts of battery and intentional infliction of emotional distress. The defendant filed partial motions for summary judgment seeking to dismiss these claims, arguing that the charging party cannot show that the co-worker's actions were authorized, ratified, or within the scope of his employment. The defendant also sought to dismiss the EEOC's claims for punitive damages.

The court granted the defendant's motions. With respect to the intentional tort allegation, as a general rule, liability of a principal for the torts of its agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal.

In this case, the court found the co-worker's actions were not authorized by the defendant, were not within the scope of employment, nor did the employer ratify the actions. With respect to the second prong, to be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment. In this case, that the co-worker handled food did not mean that putting hot sauce in the charging party's ice was within the scope of employment or in furtherance of the defendant's business. Nor was the battery incident within the co-worker's scope of employment, and the co-worker's immediate job termination indicates the employer did not ratify his behavior.

The intentional infliction of emotional distress allegation similarly fails. The court reviewed North Carolina law, and found that in courts in that jurisdiction, vicarious liability claims for intentional infliction of emotional distress is found only when the defendant failed to act in any way, rebuffed the plaintiff, or condoned the offending employee's actions after management became aware of the tortious conduct. In this case, it is undisputed that the defendant immediately fired the co-worker who hit the charging party and used racial slurs. When the charging party complained of the co-worker's actions, management did not rebuff her. Rather, management immediately believed her story. The charging party did not claim that she was ever ridiculed or retaliated against for her complaints about the co-worker, and when asked at her deposition who had racially profiled her and who was hostile to her while at work, she responded that it was only the one co-worker and no one else. Moreover, she could only describe two of the six incidents in which she claims she reported the racist actions to management.

Thus, the court found that the one time the charging party recalls reporting a specific instance to management, she was told management would take care of the situation. Accordingly, a reasonable jury could not find that the defendant ratified the co-worker's conduct based on the bare assertion that the charging party reported the co-worker's conduct other times without any description or detail or simply as a consequence of his rehiring.

The EEOC also sought punitive damages. Title VII authorizes punitive damages only when a plaintiff makes two showings. First, the plaintiff must show that the employer "engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . ." 42 U.S.C. § 1981a(a)(1). Second, the plaintiff must show that the employer engaged in the discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). That is, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
When a plaintiff relies on vicarious liability to hold an employer liable for punitive damages under Title VII, they must do so under traditional principles of agency law. Agency law provides only four ways an employer can be held vicariously liable for punitive damages based on the act of an employee: (1) when the employer authorizes the employee's tortious act; (2) when an employee is unfit and the employer acts recklessly in employing the employee; (3) when the employee served in a managerial capacity and was acting within the scope of employment; or (4) when the employer or managerial agent of the employer ratified or approved the act. In this case, the court explained that not only was the co-worker fired, but also placed on six months' probation when rehired. That he was rehired does not create a genuine issue of material fact as to whether the defendant discriminated against the charging party "with malice or with reckless indifference to [her] federally protected rights." Such a finding would preclude a defendant from ever giving an employee a chance to redeem themselves. Therefore, while a reasonable jury could find the defendant liable for compensatory damages, the record does not support a claim for punitive damages under Title VII as a matter of law. In sum, the court granted the defendant's partial motions for summary judgment, and dismissed the EEOC's and charging party's claims for punitive damages, as well as the charging party's claims for battery and intentional infliction of emotional distress against the defendant.					
Title VII Religious Discrimination Failure to Accommodate	Publix Super Markets, Inc.	U.S. District Court for the Middle District of Tennessee No. 3:17-cv-1308	2020 U.S. Dist. LEXIS 151066 (M.D. Tenn. Aug. 20, 2020)	Parties' Cross Motions for Summary Judgment **Result:** Mixed. The court denied the EEOC's failure-to-accommodate and failure-to-hire claims, and granted defendant's motion for summary judgment on the EEOC's constructive discharge claim.	Did the defendant's withdrawal of its offer of employment based on the charging party's refusal to comply with its appearance policy for religious reasons constitute constructive discharge? Did the defendant's refusal to accommodate the charging party's religious-based hairstyle constitute religious discrimination?

Commentary:

The EEOC alleged that the defendant supermarket failed to hire the charging party, a Rastafarian, because he would not cut his dreadlocks, which he claimed were a manifestation of his sincere religious beliefs. The defendant maintained a work rule that forbade male employees from wearing hair reaching their shirt collar. The EEOC claims the defendant failed to accommodate the charging party, resulting in his constructive discharge.

Upon learning of the work rule during the interview process, the charging party said his dreadlocks were based on his religion, and asked if he could wear his hair under a hat. The interviewer allegedly said he would check and get back to him. After extending the charging party an offer of employment, the manager said he could not deviate from the store's appearance standards. The charging party spoke with a customer service manager, who reiterated the store policy and asked the charging party whether he wanted the defendant to rescind its job offer, to which he replied "yes."

The EEOC contends defendant's withdrawal of its offer of employment constituted constructive discharge and that its practice of refusing to provide accommodation for his religious beliefs was unlawful. In its lawsuit, the EEOC sought partial summary judgment on the issue of liability on all if its claims, while the defendant sought summary judgment on all of the EEOC's claims.

To establish a *prima facie* case of failure to accommodate, the EEOC must show that the allegedly aggrieved person: (1) holds a sincere religious belief that conflicts with an employment requirement; (2) informed the employer about the conflict; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement. If and when an employee establishes a *prima facie* case, the employer has the burden to show that it could not reasonably accommodate the employee without undue hardship.

The court noted that although the EEOC frames the claim here as constructive discharge, it could also be characterized appropriately as "failure to hire," since the charging party never worked a day for the defendant. Title VII prohibits employers from refusing to hire an individual based on religion. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S. Ct. 2028, 2031, 192 L. Ed. 2d 35 (2015). To establish a *prima facie* case of failure to hire, the EEOC must show that the allegedly aggrieved person: (1) holds a sincere religious belief that conflicts with an employment requirement; (2) informed the employer about the conflict; and (3) was not hired because of the conflicting requirement.

The first two requirements are essentially the same for a failure-to-accommodate claim. The court noted "it is the third element (dealing with the consequence to Plaintiff of the conflict reflected in the first two elements) that reflects the only difference in the two kinds of claims." In contrast, to demonstrate a claim for constructive discharge, a plaintiff must show that (1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, (2) the employer did so with the intention of forcing the employee to quit, and (3) the employee actually quit.

The charging party supplied recordings of his conversations with company personnel. While the defendant challenged the authenticity of the recordings, any issue on this point would go to their weight.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
The EEOC alleged the recordings indicated direct evidence of religious discrimination. However, per the court, this evidence shows, at most, a request for accommodation. It is not direct evidence of discrimination. "This evidence is, however, circumstantial evidence that could go towards meeting Plaintiff's burden to make a *prima facie* showing on each of the three elements of Plaintiff's failure-to-accommodate and failure-to-hire claims. That is to say that, presented with such evidence, a reasonable jury could, but not necessarily would, find the existence of each and every one of the three elements." However, a reasonable jury could find in the EEOC's favor, but would not be required to. "This, in turn, means that neither side has met its burden on its motion for summary judgment." Because there is a genuine issue of material fact as to the second element (whether charging party informed defendant of a conflict between his (alleged) sincere religious beliefs and the defendant's grooming policy), the court declined to award summary judgment as to liability. Moreover, the parties disagreed about whether the charging party holds a sincere religious belief that conflicts with the policy. Because the EEOC could prevail on the first two elements in front of a jury, the defendant could not prevail on summary judgment unless it was able to show that no reasonable jury could find that the charging party was disciplined or discharged because of the grooming policy. The EEOC contends it was clear the defendant fired him because of the policy. The defendant claims he agreed with withdrawing his acceptance of the job offer. The court found that this was up to a jury. The court did, however, grant the defendant's motion as to the constructive discharge claim, as the charging party never worked for the defendant. Therefore, he did "not experience any conditions of employment—let alone conditions that a reasonable employee would find intolerable."					
Title VII Sexual Harassment Constructive Discharge	Dolgencorp, LLC d/b/a Dollar General	U.S. District Court for the District of Maryland No. SAG-18-2956	2020 U.S. Dist. LEXIS 46978 (D. Md. Mar. 18, 2020)	Defendant's Motion for Summary Judgment **Result:** Mixed. The court granted the defendant's motion with respect to the constructive discharge claim, but denied the motion as to the hostile work environment claim.	Should the court grant the employer's motion for summary judgment as to the EEOC's constructive discharge claim and hostile environment claim?
Commentary: The EEOC alleged the defendant unlawfully discriminated against a former employee by sexually harassing her and constructively discharging her. Specifically, the EEOC claimed the charging party was subjected to a co-worker's sexually charged comments and inappropriate physical contact, and reported the incidents to the store manager. While the matter was being investigated, the manager suggested the charging party transfer to a different branch. The charging party alleged she was not offered similar hours at that location. In addition, at one point the coworker under investigation volunteered at the charging party's branch. She resigned her position that day, and did not respond to requests to return. The EEOC contends that the charging party was subjected to a sexually hostile work environment. The elements of that claim include: (1) she was subjected to unwelcome conduct, (2) the conduct was based upon her sex, (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment, and (4) the conduct is imputable to the employer. The defendant disputes the latter two factors. This court was persuaded that a genuine issue of material fact exists as to whether the conduct the charging party experienced was sufficiently severe and pervasive to alter the conditions of her employment. Per the court, this case presents a quintessential "he said, she said" situation in terms of whether the alleged harassing conduct took place.The court also found that given the concentrated nature of the behavior over a short period of time, there is also a genuine issue of material fact regarding severity of the conduct. The court next turned to the *Faragher-Ellerth* standards for imputing liability to the employer. Under those cases, an employer is strictly liable where harassment by a supervisor culminated in a tangible employment action against the plaintiff. Otherwise, the employer can avert liability if it can establish (1) the exercise of reasonable care to prevent and correct promptly any sexual harassment; and (2) the plaintiff's unreasonable failure to avail herself of preventative or corrective opportunities offered by the employer. Because the EEOC contends the tangible employment action is the constructive discharge, the court turned to that allegation.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
To prove its claim of constructive discharge, the EEOC must prove that the charging party's "working conditions [became] so intolerable that a reasonable person in [her] position would have felt compelled to resign." *Green v. Brennan*, 136 S. Ct. 1769, 1776-77, 195 L. Ed. 2d 44 (2016). In fact, an employee must show "something more" than the showing required for a hostile work environment claim. *Evans v. Int'l Paper Co.*, 936 F.3d 183, 193 (4th Cir. 2019) (Unless conditions are beyond "ordinary" discrimination, a complaining employee is expected to remain on the job while seeking redress.) The Fourth Circuit described the standard of "intolerability" as follows: > Intolerability is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign. Instead, intolerability is assessed by the subjective standard of whether a reasonable person in the employee's position would have felt compelled to resign, that is, whether he would have had no choice but to resign. *Id.* at 193. The Fourth Circuit went on to note, "The more continuous the conduct, the more likely it will establish the required intolerability. On the other hand, when the conduct is isolated or infrequent, it is less likely to establish the requisite intolerability." *Id.* In this case, the action triggering the charging party's action was the former harasser's appearance at the charging party's new location. The managers had put out a call for volunteers; there is no evidence the harasser was assigned to the charging party's store. Taking the charging party's allegations as true – that the harasser entered the store, smiled "menacingly" at her and then walking away to meet his site preparation group, was insufficient to render the charging party's working conditions intolerable. With respect to the *Faragher-Ellerth* defense, however, the EEOC established the existence of genuine issues of material fact as to both facets of this defense: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Thus, the question of whether the defendant can avail itself of this defense is best left up the jury.					
Title VII Sexual Harassment	Ecology Services	U.S. District Court for the District of Maryland No. ELH-18-1065	2020 U.S. Dist. LEXIS 48944 (D. Md. Mar. 19, 2020)	Cross Motions for Partial Summary Judgment **Result:** Mixed. The court denied both motions.	Is it undisputed that an employee's improper conduct should be imputed to the defendant? Does there remain any material issue of fact regarding the charging party's reason for quitting?
Commentary: The EEOC alleges that the charging party was subjected to a hostile work environment as a result of repeated sexual harassment by a co-worker, and also alleges that she was constructively discharged from her employment. The defendant, in turn, claims the charging party voluntarily quit after she was disciplined for chronic tardiness and a performance issue. The EEOC sought summary judgment on the claim that the conduct of sexual harassment on the part of the charging party's co-worker is imputable to the defendant. To show that a hostile work environment was created on the basis of sex, a plaintiff must establish that the offending conduct (1) was unwelcome, (2) it was based on sex, (3) it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment, and (4) the conduct was imputable to the employer. The EEOC did not seek summary judgment as to the entirety of its hostile work environment claim. Rather, it sought summary judgment only as to the fourth element of such a claim, *i.e.*, that the offensive conduct was imputable to the defendant. Specifically, the EEOC alleged the defendant had an affirmative duty to prevent harassment, and "was negligent as a matter of law" because it "took no meaningful steps to prevent harassment." To support this argument, the EEOC contended the defendant did not provide the charging party with a copy of its handbook, and was negligent because it did not provide its Spanish-speaking employees with a Spanish translation of the handbook. The EEOC also claimed the defendant was negligent because it provided no training to its managers and supervisors regarding sexual harassment. The court noted, however, that the well-established standard in the Fourth Circuit is that the employer must have actual or constructive knowledge of the harassment. In this case, whether the defendant had actual or constructive knowledge of the harassment is a material matter and one that is vigorously disputed. The court therefore denied the EEOC's motion. For its part, defendant sought summary judgment as to the EEOC's claim of constructive discharge. A claim of constructive discharge arises when an employee resigns because the "circumstances of discrimination" made the employee's working conditions "so intolerable that a reasonable person in the employee's position would have felt compelled to resign." To establish a claim of constructive discharge, a claimant "must prove first that [s]he was discriminated against by [her] employer to the point where a reasonable person in [her] position would have felt compelled to resign" and then show that she actually resigned. Intolerability is a high bar. As the Fourth Circuit has emphasized, "difficult or unpleasant working conditions and denial of management positions, without more, are not so intolerable as to compel a reasonable person to resign." Notably, to establish a claim for constructive discharge, "the plaintiff must show 'something more' than the showing required for a hostile work environment claim." In this case, the court denied the defendant's motion, as there remains a genuine dispute of material fact over the reason the charging party quit. The EEOC claims it was due to harassment; the defendant claims it was because of anger over certain disciplinary measures.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Sexual Harassment	Magneti Marelli of Tennessee	U.S. District Court for Middle District of Tennessee No. 1:18-cv-00074	2020 U.S. Dist. LEXIS 32804 (M.D. Tenn. Feb. 26, 2020)	Defendant's Motion for Summary Judgment; EEOC's Partial Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment, and granted the EEOC's partial motion on the defendant's defense that the EEOC failed to meet its statutory duty to conciliate.	Was a manger's conduct severe or pervasive enough to constitute a hostile work environment? Did the EEOC fail to meet its duty to conciliate because it failed to identify all class members?

Commentary:

The EEOC alleged a manager at the defendant's manufacturing plant sexually harassed the charging party and a class of female employees, subjecting them to repeated offensive and sexually suggestive comments, physical contact, and offers for promotion in exchange for sex. One employee twice reported the manager's conduct to human resources, although resigned shortly after the second instance. The defendant filed a motion for summary judgment. The EEOC also filed a motion for partial summary judgment on the defendant's defense that the EEOC failed to meet its statutory duty to conciliate.

In its motion for summary judgment, the defendant claimed the EEOC had not established that the claimants were subject to sexual harassment that created a hostile work environment because the conduct was not severe or pervasive enough. Moreover, the defendant claimed it could not be liable for the manager's behavior because he was not a "supervisor."

The court disagreed. Sex-based discrimination is a Title VII violation when it creates a hostile or abusive work environment. 42 U.S.C. § 2000e-2(a)(1). A *prima facie* case requires the plaintiff to show that the claimant (1) is a member of a protected class (female); (2) she was subjected to harassment, either through words or actions, based on sex; (3) the harassment had the effect of unreasonably interfering with her work performance and creating an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the part of the employer.

The court determined that all elements of this test were met. First, the claimants were all women. Second, a reasonable jury could find that the claimants were subject to words or actions based on their sex, as harassment based on sex is satisfied by sex-specific words. With respect to the severity of the harassment, harassment capable of creating a hostile work environment means that, "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). This test is both objective and subjective – it must constitute a hostile or abusive environment both to the reasonable person and the actual victim.

The court noted that when considering the totality of the circumstances, courts do not focus on the discrete, individual incidents of alleged harassment, but "review the work environment as a whole" because "accumulated effects of" individual instances of sexual harassment against a given claimant may create a hostile work environment even if those individual instances in isolation might not. The court explained that the assembly line environment and the manager's "flagrant behavior" exposed this harassment to multiple employees. Thus, the EEOC was able to show basic evidence that employees were individually aware of the harassment experienced by other claimants. Moreover, repeated sexually offensive comments can meet the mark of severe or pervasive harassment, and an instance of physical touch adds to the severity of the conduct.

In this case, the manager was alleged to have made implicit and explicit sexually suggestive comments on an ongoing basis. Thus, the court found the record contained sufficient evidence for a jury to find the manager's conduct severe or pervasive.

Regarding the fourth element, the defendant argued the manager was not a "supervisor," but rather the claimants' "co-worker." As such, the defendant could only be liable if it was negligent. There was some dispute as to whether the manager had the authority to hire and fire employees. The manager himself claimed to have had that authority, and an employee suggested the manager was the one who ultimately promoted her. Other management members, however, denied his having such authority. With respect to negligence, the company's anti-harassment policy was inadequate. Although the defendant had a policy against sexual harassment, there was a dispute as to whether new hires were trained regularly. In addition, the manager claimed such training consisted only of reading and signing a form that explained sexual harassment without a discussion.

The court therefore determined that considering the evidence in the light most favorable to the Commission, a rational jury could find that the manager was a "supervisor." Moreover, under the standard for summary judgment, the defendant cannot avail itself of the *Faragher-Ellerth* affirmative defense to vicarious liability for a supervisor's harassment because a jury could reasonably find from these facts that the defendant did not exercise reasonable care.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
The court therefore denied the defendant's motion for summary judgment. As to the EEOC's motion on the conciliation issue, the defendant argued the EEOC did not meet its conciliation requirement because it asked the EEOC to provide the number of members, their identity, and the parameters of the class, but the EEOC declined to further specify the class during conciliation. The court disagreed after taking a "barebones" look at the EEOC's conciliation attempt, as per *Mach Mining v. EEOC*, 575 U.S. at 489, 494 (2015). The EEOC's statutory conciliation obligation requires that it communicate information about "the alleged unlawful employment practice," describing "what the employer has done and which employees (or what class of employees) have suffered as a result." *Id.* at 488, 494. The court found there is no genuine issue of material fact that the EEOC met this duty, as it notified the defendant that the charge was on behalf of the charging party and a class of female employees who were harassed by the same supervisor. This was akin to charge on review in *Mach Mining*. Thus, the court declined to further scrutinize the identification of class members.					
Title VII Sexual Harassment	New Prime, Inc.	U.S. District Court for the Western District of Missouri No. 6:18-03177-CV-RK	2020 U.S. Dist. LEXIS 17811 (W.D. Mo. Feb. 4, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment.	Should the court grant the defendant's motion for summary judgment on the EEOC's claim for hostile work environment under Title VII on the grounds the alleged harassing behavior was not unwelcome or sufficiently severe or pervasive?
Commentary: The EEOC alleges a trucking company allowed an accused harasser to work in close contact with a female employee, who then subjected her to daily harassment. The company official who assigned the female driver to the alleged harasser believed the prior harassment investigation needed to be kept confidential. Following the assignment, the accused driver allegedly made repeated advances and sexual comments to the charging party, as well as threatening comments. He referenced a gun, told the charging party he had been accused of rape, and insinuated that he had killed his wife. After the charging party complained, she was removed from the harasser's direction. The EEOC sued for sexual harassment, and the defendant moved for summary judgment. The court explained that to establish a hostile work environment claim under Title VII, plaintiffs must show that (1) the charging party is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment was so severe or pervasive that it affected a term, condition, or privilege of her employment; and (5) defendant knew or should have known of the harassment and failed to take appropriate remedial action. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 965-66 (8th Cir. 1999). The defendant argued that the plaintiffs cannot satisfy the second element (unwelcomeness) and the fourth element (severity or pervasiveness). With respect to the unwelcomeness claim, the defendant argued that the alleged harasser's behavior cannot be deemed unwelcome because the charging party engaged in similar behavior. Specifically, the defendant pointed to text messages between the charging party and her boyfriend that used sexually explicit language, knowing that the harasser was monitoring her texts. The defendant also noted the charging party told the harasser about a sexual encounter, and on one occasion voluntarily asked the alleged harasser to join her at a bar. The court found the charging party's actions insufficient to show the harasser's comments and behavior was welcome. The court explained that the text messages do not definitively indicate the charging party was inviting the harasser's requests for sex. To the contrary, some text messages show she told him his advances were unwelcome and wanted to focus on the job. With respect to the severity/pervasiveness claim, the defendant argued the alleged misconduct was not severe enough because the harasser never touched the charging party and because her text messages show that she was more bothered by his other actions, such as not letting her shower often enough and allowing management to "walk all over" him. The law is clear that an employee need not be touched to sustain a sexual harassment claim. Moreover, the text messages alone are insufficient to derive the charging party's mental state or the atmosphere of the work environment. The record, therefore, does not conclusively show a lack of severity or pervasiveness. In addition, the confined space and atmosphere of the particular work environment could add to the sense that the charging party felt threatened. The court therefore denied the motion, finding that it could resolve plaintiffs' claims as a matter of law prior to trial.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Sexual Harassment Retaliation	Safie Specialty Foods Co., Inc.	U.S. District Court for the Eastern District of Michigan, Southern Division No. 18-13270	2019 U.S. Dist. LEXIS 191624 (E.D. Mich. Nov. 5, 2019)	Defendant's Motion for Summary Judgment and the EEOC's Motion for Partial Summary Judgment as to Liability **Result:** Mixed. The court denied both parties' motions for summary judgment.	Was the alleged conduct by the charging parties' coworkers sufficiently severe or pervasive enough to constitute a hostile work environment under Title VII? On the retaliation claims, has the EEOC established a causal connection between the employees' protected activity and the company's decision to terminate their employment?

Commentary:

The EEOC alleged that the defendant failed to remedy a complaint of sexual harassment and retaliation against four workers for either making or supporting the complaint. The EEOC claimed the company subjected two female production workers to a sexually hostile work environment. According to the EEOC, the women were repeatedly the targets of unwelcome sexual advances, comments, lurking and staring by the lead processing employee, who is also the husband of a high-ranking employee at the company. One of the women complained of the harassment to her shift supervisor, who then notified higher-level management and submitted a written report.

The allegations of harassment were supported and corroborated by the other victim and a male co-worker. The shift supervisor, male co-worker, and both women were fired.

Defendant filed a summary judgment motion, seeking summary judgment in its favor as to all claims. Defendant contends that the hostile work environment sex harassment claims fail because: 1) the alleged conduct by the employee at issue was not severe or pervasive enough to constitute a hostile work environment under Title VII; and 2) the EEOC cannot establish employer liability. Defendant contends it is entitled to summary judgment on the retaliation claims because: 1) the EEOC cannot establish a causal connection between the employees' protected activity and the company's decision to terminate their employment; 2) and the EEOC cannot show that the company's stated legitimate, non-discriminatory reason for the terminations is a pretext for illegal retaliation.

The EEOC opposed defendant's motion and filed its own motion for summary judgment as to liability only. The EEOC claimed it was entitled to summary judgment as to liability for the hostile work environment sexual harassment claims because the unrefuted evidence establishes that the company had a hostile work environment and that the company knew or should have known that its employee was engaging in illegal conduct and failed to stop it. The EEOC also argued it is entitled to summary judgment on the retaliation claims, as to liability, because the unrefuted evidence shows that all four of the employees at issue engaged in protected activity and were then suspended or fired within hours or days of that protected activity and no reasonable juror could conclude that the company's purported reasons why it took those actions are legitimate.

The court first looked at Sixth Circuit law regarding the "severe or pervasive" standard for sexual harassment. The court noted the court must examine a nonexhaustive list of factors to consider, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Jordan v. City of Cleveland*, 464 F.3d 584, 597 (6th Cir. 2006), quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). "[S]exual comments and harassing acts of a 'continual' nature are more likely to be deemed pervasive." *Id.* In addition, the Sixth Circuit "has also made clear that harassment involving an 'element of physical invasion' is more severe than harassing comments alone." *Id.* at 334.

In looking at the record, the court denied the company's motion. In its opposition to the employer's motion, the EEOC was able to provide a list of numerous examples of the alleged harasser's conduct towards the charging parties.

With respect to the EEOC's motion on liability, both parties recognize that this case involves alleged coworker harassment. "[W]hen coworker harassment is at issue, an employer is not liable for 'mere negligence,' but is liable 'if its response manifests indifference or unreasonableness in light of the facts the employer knew or should have known." *Hawkins* at 338 (quoting *Blankenship v. Parke Care Ctrs., Inc.*, 123 F.3d 868 (6th Cir. 1997)).

The court found the EEOC presented sufficient evidence such that a reasonable juror could conclude that the company knew or should have known about the harasser's conduct. The EEOC, however, asked the court to rule as a matter of law that there is employer liability and grant summary judgment as to liability on the hostile work environment claims. The court declined to do so, allowing the claim to be presented to a jury.

The court then examined the retaliation claims under the *McDonnell Douglas* framework. In order to establish a *prima facie* case of retaliation, a plaintiff must show that: 1) the plaintiff engaged in a protected activity; 2) defendant knew that the plaintiff engaged in that protected activity; 3) defendant took an adverse, retaliatory employment action against the plaintiff thereafter, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and 4) there was a causal connection between the plaintiff's protected activity and the adverse employment action. Here, the only element in dispute is the fourth element. The company contends that, as to all four employees, the EEOC cannot establish a causal connection between their protected activity and their terminations.

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The Sixth Circuit has cautioned against drawing an inference of causation based on temporal proximity alone, except in situations where the adverse action occurs very soon after the protected activity. The court noted that in this case, the adverse actions occurred very soon after the protected activity. "So soon, in fact, that there was virtually no subsequent work time periods during which any other incidents indicative of retaliation could have occurred." The court therefore concluded that the temporal proximity alone was enough to create an issue of fact as to the causal connection element of a *prima facie* case of retaliation for all four employees. In addition, the court found there existed other circumstantial evidence that could support an inference of a causal connection. Finally, the court determined that the EEOC was able to put forth sufficient evidence of pretext as to each of the employees on whose behalf it brings a retaliation claim and the EEOC's lawsuit therefore survives summary judgment.					

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